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FEDERAL ELECTION COMMISSION

PUBLIC HEARING

ON

ELECTIONEERING
COMMUNICATIONS

- - -

Thursday, August 29,

2002 9:40 a.m.

COMMISSIONERS PRESENT:

DAVID M. MASON, Chairman
KARL J. SANDSTROM, Vice
Chairman BRADLEY A. SMITH,
Commissioner MICHAEL E. TONER,
Commissioner SCOTT E. THOMAS,
Commissioner DANNY LEE
McDONALD, Commissioner

ALSO PRESENT:

LAWRENCE H. NORTON, General Counsel

ROSEMARY SMITH, Associate General

Counsel JAMES A. PEHRKON, Staff

Director

9th Floor Conference Room
999 E Street, N.W. Washington, D.C.

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CHAIRMAN MASON: The Special Session of the Federal Election Commission for August 29, 2002 will come to order. This is the second day of our

hearing on electioneering communications, and we'll be hearing from two panels this morning. The first panel consisting of Don Simon representing Common Cause and Democracy 21, and Larry Noble and Paul Sanford representing the Center for Responsive

Politics and its FED Watch Project. We're always happy to be watched.

I understand that Mr. Simon and Mr. Noble will make some opening remarks, and so, Don, why don't you start?

MR. SIMON: Thank you, Mr. Chairman. I appreciate the opportunity to testify today on behalf of Common Cause and Democracy 21. As we indicated in our written comments, both organizations are long-standing proponents of the

reforms enacted by Congress in the Bipartisan Campaign Reform Act.

Title IIA of the Reform Act is, after long

4 deliberation, a

congressional response to the

progressive erosion of the ban on corporate and union expenditures in Section 441(b), which has been a core provision of the FECA for decades. A

system of cheating on that provision sprung up in the

wake of the Supreme Court's 1986 decision in the MCFL case, and Congress and the BCRA responded to close a very big and very obvious loophole in the statute you administer.

The theory of Title II is to demarcate a bright line test to identify certain communications that are then subject to certain federal rules.

The test is not perfect. No one claims that it is. Any of you can come up with a clever hypothetical

to illustrate an awkward application of that test. But I

think that kind of exercise is

beside the point. Congress doesn't claim perfection for the test nor does the constitution require it, nor does any law ever achieve it. The

test does fairly address what has grown into an obvious and debilitating problem in the integrity and efficacy of Section 441(b).

5 After closely

examining multiple options, and after carefully considering the constitutional constraints, Congress decided this provision was the best way to restore some reasonable measure of effectiveness to Section 441(b).

Title II is by its nature a compromise and a balancing among competing considerations, some policy in nature, some constitutional in nature.

As always, your job is to respect and to implement

the difficult judgments made by Congress whether you

agree with them or not.

I want to focus my comments on the most difficult problem before you, which is the scope of your authority to craft exemptions to the statute.

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I want to focus my comments on the most difficult problem before you, which is the scope of your authority to craft exemptions to the statute.

At the core of the approach chosen by the Congress in this law is the decision to draw a bright line test to define electioneering communications.

Congress then provided several statutory exemptions to that test in Section 434(b)(3)(b), and authorized the commission in Clause 4 to implement by regulation other appropriate exemptions. □

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There are two constraints on the commission's Clause 4 authority, which caution that

it should be used sparingly. First, an exemption should to the degree possible incorporate clear standards of the same nature as the underlying definition of electioneering communication itself. The whole point of Title IIA is to subject certain communications to regulation based on a clear-cut definition. It would defeat that purpose for the commission to draft exemptions to that definition which are not equally precise and which would thus serve to undermine the clarity of the basic statutory test itself.

Second, an exemption should not be overbroad in the sense of allowing in through the backdoor precisely those kinds of ads which Congress enacted Title II to address.

Even though you may intend an exemption to eliminate from statutory coverage those communications that you think fairly do not have an electoral message, you should not underestimate the creativity, ingenuity and tenacity of those who ☐ will seize upon an exemption you write to recreate precisely the problem that the statute was meant to eliminate.

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The proposal to write a generic exemption for all PSAs, for example, illustrates the problem. Even though one could easily imagine broadcast ads within such an exemption, that would not be

problematic, it is equally easy to imagine many that would.

So you should approach the drafting of any exemption with an abundance of caution and ensure to the degree possible that the exemption is not only clear but narrow. If it can't be written to avoid overbreadth and to minimize the potential for abuse, then it should not be written at all.

The commission's Clause 4 authority is not a hunting license for you to solve every problem real or imagined with a statutory provision, nor is it a congressional punt to the commission to go try to make the statute perfect. It provides instead a circumscribed authority for the commission to issue narrowly crafted regulations to alleviate any □

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serious misapplication of the bright line statutory definition if that can be done without creating new and clearly foreseeable problems that undermine the purpose of the statute.

The commission should not view its job as one to think up probably hypotheticals that need to be addressed. It should not address problems that are speculative or will occur at best only rarely, nor should it assume that the law will be implemented in a fashion that lacks judgment or common sense. Thank you.

CHAIRMAN MASON: Thank you. Mr. Noble.

MR. NOBLE: Mr. Chairman, members of the commission, Mr. General Counsel and staff, the Center for Responsive Politics and its campaign finance law product, FEC Watch, is again pleased to present testimony regarding the rulemaking in the Bipartisan Campaign Reform Act of 2002. With me, as the chairman noted, is Paul Sanford, the Director of FEC Watch.

We have submitted our written comments, so I only have a few brief comments to make now. For ☐

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this portion of the rulemaking, the focus is on the legislation that regulates the so-called issue ads or sham issue ads. And these are the ads that Congress believed were thinly veiled election ads, paid for with soft money.

And that is the unregulated and often undisclosed large contributions from corporations, labor unions and wealthy individuals. No one doubts that the writing of the regulations to implement these provisions is a difficult task, and there are no easy answers to some of the questions posed.

And there is no doubt that someone today or down the road will be able to come up with hypotheticals that will make a meaningful rule look harsh or make it look somewhat unfair an application. But as the Supreme Court said in

1973, there are limitations in the English language with respect to being both specific and manageably

brief, and although a prohibition may not satisfy those intent on finding fault at any cost, it will not be considered vague if it is set out in terms □

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that the ordinary person exercising ordinary common sense can sufficiently understand and comply with even though you can find marginal cases where doubts might arise.

What the Supreme Court was in effect saying is that there are no absolutes or ironclad rules that will cover ever situation.

I raise this in light of some of the hearing I watched yesterday. There were numerous hypotheticals discussed, such as those dealing with Jay Leno, churches or a picture of the president in the background of the show "The Agency."

While it is important to discuss these questions, and I'm sure we'll get them, and I'll be pleased to give you whatever answers I can, I kept thinking that in my 23 years at the agency, the FEC rarely if ever actually had to deal with these questions in enforcement cases, and if they did come up in enforcement cases, discretion in judgment usually provided the correct answer.

In fact, when these issues did come up, and I've thought about this a lot, they usually □

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came up in the context of those late Friday afternoon discussions that lawyers have sitting around wasting the rest of the day discussing the outer limits of the law, and coming up with hypotheticals and arguing about them, because the reality was they very rarely actually came up in real life.

Likewise, while concerns about criminal enforcement of the law are valid and should be discussed, I cannot think of one criminal prosecution brought for a FECA content-based violation in the last 25 years. Now, there was all this talk yesterday about felonies, about people being dragged off to jail for content-based violations, and I guess since the National Committee for Impeachment case, I am not aware of one that was a criminal violation of prosecuted criminally.

In fact, that was one of the reasons the FEC was formed was to move those cases into the civil context, because Congress felt those cases were not appropriate for criminal prosecution. □

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Now, let me make clear in light of yesterday's discussion that I believe that even with the best intentions and even with the excellent skilled lawyers you have working for you, you will not be able to write rules that are immune from all

attempts to search for loopholes and all attempts for abuse.

That's why you have an enforcement system and why laws in this field or any other field are constantly being rewritten to deal with the loopholes that arise. But this reality only makes it clear the FEC is presented with an important choice. You can approach your task with a goal of implementing the law in effective and meaningful way, aspiring to write rules that implement the law as it intended and that are not subject to abuse, and underscore aspiring to them. It is a goal. It may be a goal you'll never be able to reach.

Or you can write regulations and exemptions that ignore the goals of Congress and put us right back to where we were before the passage of BCRA in terms of soft money and issue ads. □

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We urge the FEC to adopt rules that give this new law every chance to work as intended. We urge you to adopt rules that really focus on what Congress was trying to do. We thank you for the opportunity to testify and we'll be glad to answer any questions that you have.

CHAIRMAN MASON: Thank you. Well, I had a request, Mr. Noble, you were quoting from a '73 case, and if you could give us a case citation, that might--

MR. NOBLE: It was actually a paraphrase, and the citation, thinking you might ask for it, is U.S. Civil Service Commission v. National Association of Letter Carriers, 93 Supreme Court 2880 (1973).

CHAIRMAN MASON: Thank you. The first questioner this morning is Commissioner Toner.

COMMISSIONER TONER: Thank you, Mr. Chairman. Mr. Simon, Mr. Noble, Mr. Sanford, thank you very much for being with us. I look forward to our discussion. Mr. Simon, we've been grappling over the last couple of days with this issue of □

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when you have to disclose an electioneering communication. Do you have to as soon as you contract for services over \$10,000 or do you essentially have a trigger date only when the communication airs?

In your papers, you used this phrase of when an election communication ripens, this concept, and as I understand it your view is that is only when a communication airs?

MR. SIMON: Yeah. You have to disclose an electioneering communication in a sense when it becomes an electioneering communication, and part of that test is that it airs within a certain time frame. So you can imagine a situation where somebody is spending money to prepare an ad

intending to run it within the time frame, but then for unforeseeable occurrences, it may never air in that time frame.

In that case, it would never become an electioneering communication, so just as a matter of administrative sense, I think that the disclosure should be triggered by the ripening into □

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a statutory electioneering communication which would be the airing of a certain kind of broadcast ad within the time frame.

COMMISSIONER TONER: And is that

fundamentally because even though you may contract for services with a media entity, you may have a contract worth more than \$10,000, and they're going to do media for you, but until you actually air the spot, you don't know definitively whether it's going to be an electioneering communication?

MR. SIMON: That's right. Now, once it becomes an electioneering communication, I think you have to disclose all the money spent previously in production of the ad, and you would have to disclose any contractual obligations that pertain to the electioneering communication, but all that disclosure I think is triggered by the ripening of the communication into a statutory electioneering communication.

COMMISSIONER TONER: Mr. Noble, I

understand that you, sir, have a two-part proposal.

How would that work? □

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MR. NOBLE: Let me defer to Paul on this one.

COMMISSIONER TONER: Okay.

MR. SANFORD: We were trying to come up with a possible way to give some meaning to the provision in the statute that talks about a contract as far as being a disbursement.

And our idea was based loosely on some of the strategies that were used in the independent expenditure reporting context, where perhaps some costs for production of an independent expenditure were incurred sometime prior to when the actual independent expenditure was made.

And I think that those rules contemplate some sort of generalized disclosure about those initial disbursements, and then subsequently after the actual dissemination of the independent expenditure, the more specific disclosure of I think additional information as to which candidate was supported by the independent expenditure, when it actually ran, and that sort of thing.

So we aren't necessarily wedded to a □

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particular method, a particular kind of mechanics for how this is done, but we thought there might be a way since it seems the really critical

information about an electioneering communication that one might not want to disclose in advance might be some of the information about who's going to be identified in the communication, which candidate is going to be identified and some of the more specific information about it, that that could be deferred until a later point, and then we can still give some meaning to this disbursement contract and make a disbursement provision in the statute by requiring some very generalized disclosure earlier at the time the contract was made or perhaps the time some preliminary disbursements were made for the communication.

COMMISSIONER TONER: What would be your thought on Mr. Simon's point that until the spot actually airs, you don't know if you're ever going to air a spot at all? Is that a fair point?

MR. SANFORD: I think that's a fair point. You know I think that that method of disclosing is ☐

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certainly adequate. I mean in terms the disclosure of the communication, the critical information from a disclosure standpoint is that information that gets put out right after the communication is aired.

COMMISSIONER TONER: But that's the critical piece?

MR. SANFORD: Yeah, that's the critical

piece. We were just kind of trying to see if there was a way that that provision that refers to contracts to make disbursement being disbursements could also be reconciled, could be incorporated in some way into the rules. So I think that it would be worth the commission's consideration to look at that.

If there is some way to have a generalized disclosure at the beginning that doesn't really sort of show your cards, for lack of a better word, and remember, when you file, if you require

somebody to do that, and then they ultimately do not run the electioneering communication, they can always amend their report, and, in fact, they □

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wouldn't necessarily be required to amend reports, because the disbursement itself would have already had--that would have actually happened. So I'm not sure I have all the details worked out.

COMMISSIONER TONER: I appreciate it very much. That's very helpful. Mr. Simon, you also discuss another key issue in your paper, and that is this direction or control issue in terms of a disclosure of individuals who exercise direction or control over electioneering communications. As I understand your papers, your view is that we should require disclosure beyond those individuals who have input into the communications, and extend it

to individuals who exercise direction or control over the organization as a whole? Is that a fair reading of your--

MR. SIMON: Yeah, and that is based solely on the language of the statute. The statute says direction or control over the activities of the organization, and I don't see how you get there from the statutory language to say that applies only to direction or control over the □

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electioneering communication itself.

COMMISSIONER TONER: How would you define the scope of that?

MR. SIMON: Well, you know, I think this is one of the statutory terms and provisions that really needs to be implemented in light of the purpose, and I think the purpose here on this one is pretty clear.

I mean there was colloquy yesterday, I believe it was with you, about, gee, you know, how do you identify all the people who exercise direction or control over the Republican Party? That's not what this is about. What this is about is to try to capture meaningful disclosure and to prevent the use of kind of sham front organizations to hide the people actually behind the activity, to hide the people behind the sham front, to hide the people controlling the money and determining the

expenditure.

You could easily imagine a situation where you have a group that sets up another organization, a 527 of some sort, with some sort of generic bland name, and provides the money to that organization, and that organization makes the electioneering communication.

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If the disclosure is only of the name of that organization, you really won't know who's behind this and where the money is coming from. I think that's the case that the statutory provision is intending to address, where you have that organization behind the front group really exercising the control over that front group, directing the activities of that front group, that's the situation in which the commission should require disclosure of the group exercising direction or control.

COMMISSIONER TONER: Thank you. I don't know if that's a signal that we lost some of our light, but I found your comments very illuminating.

CHAIRMAN MASON: Commissioner McDonald.

COMMISSIONER McDONALD: Thank you, Mr.

Chairman. Good morning and welcome to all of you, Larry, Paul, Don. I do want to pursue a little bit of yesterday's discussion, because I just think

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it's critical in terms of the public's understanding of what we're doing. I hope all of those that are interested in this understood the opening remarks by Larry Noble who has dealt in this area for 25 years, and yesterday a number of the witnesses were asked their extent of their experience, which is certainly a fair and important question, I think, and one that's critical.

The examples given yesterday, all of them are important to discuss. But I must say I thought I was at a different commission, because I simply had just never heard of any of these things nor had any of them come before us. Sadly, not long ago, we had a tragedy in this country where an individual took the position that he wanted to fight fires, and there weren't any fires, so he went out and set some, and then he offered his services to resolve the issue.

And that sounded awfully close to where we were yesterday. I just simply think it's extremely important to reiterate what was said in the opening remarks about content and whether someone has been □

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prosecuted. I want to remind people that this commission is the commission that has the ability to act, and under any scenario that was posed that I'm aware of yesterday, all of them certainly valid questions to bring up, not only have I not seen

them in my 20 plus years here, but I couldn't conceive quite frankly of us proceeding.

And so I do think it's an important matter, and I was glad it was touched on in the opening statement. Now, I think Commissioner Toner brought up a very interesting question that I'd like to pursue a little bit on direction and control.

Yesterday, it was stated that there were a lot of people who were in direction and control of the Republican Party. And I'd like to ask the panelists if that would be their experience in following this law for over 20 years? And the reason I ask is that in the headlines today in The Washington Post, "Fast and Loose at WorldCom, Lack of Controls, Pressure to Grow Set Stage for Financial Deceptions." □

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I don't think that anyone really believes that there are a number of people that run the DSCC, the RSCC, the DNC, the RNC. There may be a lot of people with input, but I would think that there is some accountability in these areas, and I would just like to ask, particularly Larry, who's dealt with this for 25 years, what your experience was when you were here and what you've observed since then in terms of these kinds of questions that we have to grapple with?

MR. NOBLE: Well, to be perfectly honest, while I was here I heard it both ways. Some cases you hear that nobody was in control, nobody actually had responsibility for something. In other cases, you would hear it's well controlled, it was so spread out, we couldn't figure out what was going on. I think the reality of it is there is a line of control in these political committees, that when they want to do something, they know who is in control, who is making the decisions.

Sometimes you get into some difficult problems when you're going down to the lower levels □

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of the staff of whether people have authority to do things, but in one sense I'm glad you brought up the WorldCom situation, in one sense that the normal business world can be brought to the political committee world. I mean especially when we start dealing with the national party committees.

These are institutions that are large, very well financed, and I assure you when somebody is writing a large check, they know who has the authority to do that. They know whose approval they have to get, and I think it becomes somewhat almost comical when a case comes up, and all of a sudden, or a hypothetical comes up, and all of a sudden they say, well, everybody controls the

Republican Party.

oll free number." And then they provide a chart showing that only 1.1 percent of what they term "sham issue ads" include a toll free number.

30 They also point

out that only 1.3 percent of what they call "sham issue ads" reference specific legislation. In their 1998 study, they include the same type of information, and it's

important to note what these studies are. They have a bunch of graduate students watch ads or look at story boards for ads and then say whether they think it's an electioneering ad or an issue ad, a genuine issue ad or a sham issue ad.

And then how did they determine whether the students got it right? Well, according to the 1998 study, they did this because they made the judgment with little uncertainty and with a high degree of accuracy, given the findings about toll

free phone numbers and bill mentions.

In other words, if we wanted to know how do we know that the college students got it right when they coded the ads as being a sham or being genuine, well, we know that because the ads they

coded as being shams didn't have the toll free numbers or the bill mentioned.

Now, alternative 3(c) in the regulations

31 as an exemption

is based on that theory then.

Well, okay, let's exempt the ads if they include a toll free number and bill information, and both of your comments have strongly opposed that possible

exemption, and I wonder if you would comment briefly on that?

MR. NOBLE: I can begin on that. I think that's a little bit like saying that because someone with pneumonia has a cough, every time we

hear a cough, we're going to say someone has pneumonia.

What they were pointing out there is what in their study certain issue ads have, which is the 800 number. It doesn't mean that, and I think it

would be a very big mistake, to say that, okay, well, now if you put an 800 number in your ad, you're an issue ad, because that is one of the areas where the commission, I think, would knowingly be writing a major loophole into the law,

effectively inoculating what are these so-called sham issue ads from any regulation by just telling somebody put an 800 number in.

32 In fact, that's

been the history of these ads, is that when you give them the line of what to do, they will hit that line, and then have the rest of the ad be about the candidate. I also think it would run directly contrary to congressional intent.

What Congress did not want to do was have this formulaic response that would just say 800 numbers or you mention some magic words, and you're

out of the process. Rather what Congress did in its wisdom is it set a bright line in terms of timing, in terms of targeting and in terms of mentioning a candidate. And I think for the commission to just come forward and say, well,

we'll inoculate these ads by saying if there's an 800 number, they're not electioneering communication would run directly contrary to the intent in Congress and would be misreading the Brennan study.

MR. SIMON: If I could just second that.

I think, Commissioner Smith, you're using the Brennan study out of context in this regard. I

33 don't think they

were trying to suggest the

contours of an appropriate exemption from the definition of electioneering communication. And as Larry said, to craft something along those lines is

just really providing a very clear road map for continued evasion of the statute.

As we suggested in our comments, you know, we think that the commission could adopt an exemption for lobbying communications, but it has

to be very carefully drawn. 3(c) does not get there.

Some variant of 3(b) I think gets a lot closer, and we suggested specific language in our comments.

COMMISSIONER SMITH: Now, we're going to

have another line of questioning, and I'm going to continue following this line. I'm leading to something more generally. Basically, you've said about what I thought you'd say, and what I think is probably right.

I think it indicates that the Brennan Center study really isn't that useful in determining what are sham issue ads or what are

34 real issue ads,

at least the sort of criteria they

set out, but even more importantly, it indicates that people will change their behavior. I think this is the point that you've been trying to make,

that people will change their behavior based on what the law is.

So I'll leave it there because we're out of time and hopefully get a chance to follow up.

MR. SIMON: If I could just say, we certainly, I think everyone would hope people change their behavior in what the law is. That's the point of the law.

[Laughter.]

MR. NOBLE: I must say we were not involved in the Brennan study, but I read it more as descriptive than as a road map of what you should do. It was trying to describe a certain situation, describe certain types of ads.

COMMISSIONER SMITH: Well, anyway, I agree

with most of what you've said, and I do have a broader point we're going to get to, but I'm over for this first round. So hopefully we'll get a

35 chance to get

back to it.

CHAIRMAN MASON: Commissioner Thomas.

COMMISSIONER THOMAS: Thank you, Mr. Chairman. Gentlemen, thank you for coming. It's

always fun coming back, isn't it? I guess I'll ask a couple questions to touch on a topic that we got to a little bit yesterday, but you haven't had a chance to expound upon.

That is the definitional issue of what is

meant by excepting from the definition of electioneering communication expenditures. Expenditures references a term of art under the law, and I think your organizations are taking different positions in some respects. I think

there is disagreement amongst your two organizations regarding whether expenditures by political committees that have to register and report with the FEC should in and of themselves always, in essence, be exempt from the

electioneering communication reporting rules?

I think, Larry, your organization indicates that there might nonetheless have to be

36 reporting as an

electioneering commission even by

say a candidate's authorized committee or a registered party committee or PAC, whereas, I think Don, Common Cause, is taking the position that, in

essence, no, there shouldn't have to be any sort of duplicative reporting. Am I right on that understanding of your comments?

MR. SANFORD: If I can answer for us. We read the provision in the statute referring to

electioneering communications reporting requirements as an add-on to existing reporting requirements.

Now, that doesn't necessarily mean an authorized committee or a registered committee of

any kind would necessarily be required to report an expenditure also as an electioneering communication. The reason for that is because expenditures are exempt from electioneering communications.

If there were disbursements by such an entity that were not expenditures or independent

expenditures, or within the first exemption,

37 however you

ultimately craft it, then those would potentially be subject to the

electioneering

communications reporting requirements. Does that answer your question?

COMMISSIONER THOMAS: So let me understand. Are you saying there wouldn't be duplicative reporting in the sense that if something qualifies as an electioneering communication, it could be reported, in essence,

only as the electioneering communication. You wouldn't have to sort of do duplicate Schedule B reporting of the same disbursement as an expenditure. Is that why you're saying it would not be such a problem?

MR. SANFORD: Well, I guess I'm coming at it from the opposite direction. If it's an expenditure, it's exempt from the electioneering communications definition, so it wouldn't have to be reported as an electioneering communication.

COMMISSIONER THOMAS: Oh, okay. So maybe you're more in line with what--

MR. SIMON: If I can just jump in here.

38 COMMISSIONER

THOMAS: Okay.

MR. SIMON: I mean the way I look at this question is that the definition of electioneering communication has a statutory exemption for

expenditures and independent expenditures. It

seems to me the regulation, it makes good sense just to make that absolutely crystal clear to say that the exemption covers expenditures and independent expenditures that are made from funds

subject to the contribution limit, source prohibitions

and reporting requirements of the act.

That would ensure that only those funds, those expenditures made from hard money and already subject to FECA reporting are exempt from the definition of electioneering communication, and therefore would not be subject to duplicative Title II reporting.

I think, again, if you step back and look at the purpose of the statute, it was not to impose

duplicative reporting on money that already is within FECA. It was to capture reporting and regulation of a certain class of spending that was

39 outside of FECA.

So, although, there may be some duplicative reporting in that system, I think it makes good sense to try to minimize the amount of

it.

COMMISSIONER THOMAS: Let me take you beyond the circumstance where we have a political committee making what would be defined as an electioneering communication, but we have one of

these c(4) organizations, say, that isn't incorporated, and that can therefore make an electioneering communication, or say we have a group that is styling itself as a 527 organization that is not reporting to the FEC because it feels

it's not making expenditures, and its major purpose is not to influence elections.

In those circumstances, that kind of disbursement wouldn't be reported to the Federal Election Commission, and yet some organizations in

those circumstances might want to say, well,
actually, no, we think that's an expenditure, and
they would do that in order to fit within this

40 exception to the

electioneering communication

definition, in hopes that they can therefore avoid any
of the disclosure that would follow. How do you deal
with that?

MR. SIMON: Well, that's precisely the reason
I would frame the exemption to include only expenditures
that are subject to reporting. In other words, if a
group deems what it's doing is making an expenditure,
but then says that it's not

required to report that expenditure, it would not
qualify for the exemption from electioneering
communication, and therefore it would have to report
under Title II.

COMMISSIONER THOMAS: Okay. That's
helpful.

MR. NOBLE: And we agree with that.

COMMISSIONER THOMAS: Now let me move on a
little bit to--whoops, I'm done. I'm done. Thank you.
Thank you. I'll catch you the next round.

CHAIRMAN MASON: This is my question time.
Mr. Simon, in your written statement, you counseled
us against a blanket exemption for citizens band
effective broadcast radius for a citizens band radio is?

41 radio. Do you

MR. SIMON: I don't. I mean that was in

the context of the commission's question about low power broadcasting, and it seemed to us that the better way to deal with those issues is in the--

CHAIRMAN MASON: Let me help you a little bit. High frequency ground wave has an effective radius of about 100 kilometers. Medium frequency, about 80 kilometers. This is during the day. Of course, at night, we're all aware of the phenomenon of sky waves and so on like that.

I'll read you from a web page of one CB radio broadcast station in Fort Myers, Florida. When I first began my career in 1976, I was using a 23 channel mobile radio, something you'd find in a truck or a car. In those days, making contact with another base station 20 miles away was reason to

celebrate.

I take it that today he's operating on a much more than 20 mile basis, and, of course, if

42 you draw a 20

mile radius around Fort Myers, Florida, you've probably got half a million or a million people. And this gets back to the discussion we're having about theoretical problems.

And the problem we would encounter is that we'd either have something laying out there--to preempt Commissioner McDonald, I agree, we're not interested in. We would never go after, and if we did get a complaint about it, we would try to find

a way to let it go.

But if that's the case, you know, I don't know how we would determine how many people could receive this broadcast, because in the television and radio context, we're sort of saying, well, gee,

everybody can receive them. We're assuming universal coverage, and we're substituting population for receive.

We've got no idea how many CB sets are out there, what the radius is, and so given your

counsel to avoid trying to deal with theoretical problems in our exemption process, wouldn't you take the same here and say, well, yeah, if ten

43 years from now

somebody comes up with a CB

technology that's actually effective and actually reaches lots of people, we could revise our regs, but for now why don't we just take them off the

books?

MR. SIMON: Well, I understand the problem you're raising, Mr. Chairman. I mean it still, I mean the technological questions notwithstanding, it still seems to me somewhat of a kind of

theoretical problem in the sense that I think as a practical matter, it's hard to imagine somebody making an expenditure of \$10,000 in a particular broadcast over a CB radio, so in that sense, I'm not sure it gets caught up in the coverage of the

reporting requirements in any event.

But, you know, your decisions on these questions should be importantly informed by the nature of the technology and should be flexible enough to incorporate changes in technology over

time.

CHAIRMAN MASON: And my concern is
actually more acute when it comes to the internet,

44 because we have,

it seems to me, the same thing
being presented, which is right now there is
nothing out there we're worried about, but what if? And
my concern about that is that that could become

actually a technology limiting factor.

In other words, I wouldn't want to get into a
position where we were putting out a regulation that
caused people who were exploring a new technology to
pull in the reins because they

might theoretically say, well, this would potentially
bring us under government regulation.

Wouldn't we better off waiting and if a
problem emerges addressing it at that time?

MR. SIMON: Well, on that, and I'll let

Larry address that also, I mean I do think this is an
important question. And I think the commission got it
wrong in the Title I rulemaking, and I hope you get it
right in this rulemaking, but I think you're off on the
wrong foot in the proposed rules.

This is a somewhat different question than
the Title I context, because that wasn't a
statutory construction of the term "public

45 communications."

Here we're talking about

broadcasting. What we're concerned about is that as the
internet evolves and as technology does change, there is
going to be a kind of merger of

broadcasting dissemination and internet dissemination so
that it will be functionally indistinguishable.

In that event, we think these Title II provisions should apply to the functionally

indistinguishable form of broadcasting that takes place over the internet. Now that is not all forms or even perhaps most forms of the use of the internet. It probably does not include web pages per se. It probably does not include e-mail, but

it may well include simultaneous web casts, and it may well include video streaming, because those are forms of dissemination of information that really are functionally indistinguishable from broadcasts.

Our plea is that you not just take that

problem off the table by just writing the internet out of the statute. We think that's too preemptory and too broad-brushed an approach to a problem that

46 requires a much

more particularized and nuanced analysis.

MR. NOBLE: If I may just say, I agree with everything Mr. Simon said. I just wanted to

add a couple of things. Again, keep in mind that we're talking--I don't think this will deter any technology because we're talking about it kicking in at only a very narrow period of time in only very specific situations.

So I can't imagine somebody deciding not to further develop a broadband broadcast element on the internet because somebody might want to make a political communication over it or an electioneering communication over it.

I also think that we're not that far away from that situation right now. More and more when you watch television shows, they send you to the internet. They

say for more information, watch the outtakes from this newscast on the internet, and

with broadband communications, I think there is going to be very quickly a merger. And I think that Mr. Simon is right. It's just something that

47 we are suggesting

you should just not take off the table, and it's something you're going to have to deal with and deal with pretty quickly.

CHAIRMAN MASON: Vice Chairman Sandstrom.

VICE CHAIRMAN SANDSTROM: Thank you, Mr. Chairman, and I want to thank the witnesses for appearing here today. Your testimony will prove very helpful. Are you both familiar with the testimony of the sponsors?

MR. NOBLE: Yes.

VICE CHAIRMAN SANDSTROM: Are you familiar that they're replete with hypotheticals?

MR. NOBLE: Yes.

VICE CHAIRMAN SANDSTROM: Okay. You wouldn't mind me using any of those hypotheticals, I gather, today as being too clever, so I will ask you, paraphrase one found on page 11:

Throughout my career I have opposed Nevada being used as a nuclear waste dump. As your

governor, I will never allow that. I strongly

oppose the president's plan to do so. I will fight that plan, which will put the health of the Nevada

48 citizens at risk.

That's on page 11, but that deals with taxes. I've turned it into a hypothetical to more likely to be run by, for instance, a Nevada Republican candidate for governor. If that were run when the president were a candidate, would that be subject to 24-hour reporting?

MR. SIMON: Well, I think there's a very straightforward analysis of that question, and it

really I think is important to look at that question in the context not just of Title II but Title I, because on this matter, where we're talking about communications run by state candidates, the two parts of the statute really

blend together.

Under Title I, a state candidate must use hard money to run a public communication that mentions a federal candidate and that promotes, supports, attacks or opposes that federal

candidate. So the analysis, the question is whether the public communication you refer falls within the context of that standard?

49 If it does--

VICE CHAIRMAN SANDSTROM: That's what I'm asking.

MR. SIMON: Okay.

VICE CHAIRMAN SANDSTROM: If it does, under this law, is that subject to 24-hour reporting? I have a couple other questions, and I have a short amount of time.

MR. SIMON: Okay.

VICE CHAIRMAN SANDSTROM: I'm just wondering, you know, since that hypothetical essentially was used by the sponsors, would that be subject to 24-hour reporting?

MR. SIMON: It depends then, going back to the discussion we had with Commissioner Thomas, on whether it's considered an expenditure.

VICE CHAIRMAN SANDSTROM: But it's not an expenditure because it's being done by a state candidate.

MR. SIMON: Well, but under Title I, the state candidate would have to use hard money for that communication.

50 VICE CHAIRMAN

SANDSTROM: Okay, but--

MR. SIMON: And if he uses hard money, and it's under the reporting requirements of FECA, then it may be treated by the commission as an expenditure--

VICE CHAIRMAN SANDSTROM: Well, there may be a whole new set of reporting requirements for state candidates. But either way, they're having 24 hour reporting or more extensive monthly reporting as under the FECA.

Another example, if I could, and I hope this one isn't--get a quicker response, because I appreciate the more lengthy one, and it may be necessary to explain the position, but there's a

book out called Faith of Our Fathers, that I understand may be turned into a movie. The rights, I understand, have been purchased.

It's about John McCain and his family. If there is advertising run in 2004 and John McCain is

a candidate in 2004, and that advertising promotes the movie, Faith of Our Fathers, would that be an electioneering message?

51 MR. NOBLE:

Probably not, and I think there are certain situations. We can carve out examples, and this is a good one where I can tell you this question has come up before. I remember

it came up with John Glenn, and The Right Stuff movie, about whether or not that was going to be considered some type of--

VICE CHAIRMAN SANDSTROM: Can you describe the exemption?

MR. NOBLE: Well, again, this is one of the tougher areas that goes to the Jay Leno question of whether or--of who's putting it out, whether or not it's going to be considered part of commentary, of whether there is an entertainment

part of commentary, but I don't want to give a blanket exemption to that.

VICE CHAIRMAN SANDSTROM: Let me understand this. How, if we don't give a blanket exemption to it, are people to know how to conform

their conduct to the law? Either that advertising, and the showing of that movie conceivably--that was going to be my follow-up question--the showing of

52 that movie on pay

per view or on TNT or any number

of other channels, would that entertainment

programming, the running of that movie, just like the movie PT 109 might have benefitted John

Kennedy, that movie if Senator McCain is a candidate may benefit him. Would the running of that movie--is an entertainment program exempted in some instances and not in other instances?

MR. NOBLE: If the movie was produced and

advertised and broadcast through normal commercial channels, then I think there is an area for exemption. On the other hand, a blanket exemption that would allow somebody to singly fund a quote "documentary" or a movie about the wonderful life

of John McCain, and start selling it or buying time for it right before an election, I don't think should be exempted.

VICE CHAIRMAN SANDSTROM: So Disney can make that decision if they bought the rights, but

someone else couldn't produce the movie because they're more suspect?

MR. NOBLE: Right now there's a media

53 exemption that

applies to the broadcast industry.

There are cases that say that even the broadcast industry, when acting as the broadcast industry, gets exempted. If they're not acting as a

broadcast industry, they don't get exempted.

VICE CHAIRMAN SANDSTROM: Where is that exemption? Where is that exemption?

MR. NOBLE: Reader's Digest case.

VICE CHAIRMAN SANDSTROM: Where is the exemption in our regulations or the statute? The Reader's Digest is a news magazine. But where is the exemption that covers all movies? You say it covers some movies, but it doesn't cover other movies. Who produced them?

MR. NOBLE: I'm working by analogy which I think you sometimes have to do in these situations and the analogy is that you have certain exemptions. The broadcast exemption for media. It's a media exemption. What is understood about

the media exemption, it applies to media which is now becoming admittedly a more difficult question of what is a media business. But it only applies

54 to the media when

they're acting in their media capacity. It doesn't apply to them when they're acting outside.

So, therefore, your first question as the Reader's Digest case said is are they--

VICE CHAIRMAN SANDSTROM: But isn't everything that goes on--

MR. NOBLE: Sorry?

VICE CHAIRMAN SANDSTROM: --television

media? I mean isn't the whole broadcast, the whole, this regulates media. There is a media exemption that covers, subsumes this law, so if anything they do for themselves.

MR. NOBLE: Mr. Vice Chairman, that's not

what I'm saying, if I can finish. What I'm saying here is that there is a media exemption, that the analysis begins is it a media company? Second question: are they acting in the capacity of a media company?

The example the Reader's Digest case used was The New York Times would be exempt under the media exemption for doing an editorial. However,

55 if they took out

a billboard that said "Vote for

Bush," they would not be exempt under the media exemption. This is the case law in this area, and I think by analogy, it can be applied here.

CHAIRMAN MASON: We obviously have a desire for a second round of questions, at least from commissioners. So we will go back to Commissioner Toner, if he desires a second round.

COMMISSIONER TONER: Thank you, Mr.

Chairman. I just want to follow up.

CHAIRMAN MASON: Oh, I'm sorry.

COMMISSIONER TONER: I believe the General Counsel would be--

CHAIRMAN MASON: I'm skipping the General

Counsel and the Staff Director. So let's do that first.

Mr. Norton.

MR. NORTON: Thank you, Mr. Chairman. I wanted to focus for a moment on the potential exception for communications urging support for or

opposition to legislation, and I was thinking of a hypothetical ad last evening, not for the purpose of trotting out a parade of horrors but for

56 helping me and

the commission understand where that

high bar is, and to give better definition to the limits the commission is under in crafting exceptions to the electioneering communication.

And the ad that came to mind, and I think is a variation of ads that are running, is this:

Some politicians have become too cozy with big drug companies, and as prices of drugs are skyrocketing, seniors are suffering. Call Senator

Jones and tell him to support Medicare coverage for prescription drugs. It's time to put America's seniors first.

Now, I was looking last night at the suggestion from Center for Responsive Politics, and

as I read your proposed exception, this would fall within it.

MR. NOBLE: Correct.

MR. NORTON: It's devoted exclusively to a pending legislative matter and the only reference

to a clearly identified federal candidate is a statement urging the public to contact that

candidate to take a particular position. That's

57 right?

MR. NOBLE: That's correct.

MR. NORTON: If that ad ran as it is in the two or three weeks or month before a primary election that involved Senator Jones, and in Senator Jones' state, would it be your view that that ad promotes, supports, attacks or opposes Senator Jones as you understand that phrase?

MR. NOBLE: Good question.

MR. SANFORD: Can you read the last part of the ad again?

MR. NORTON: Call Senator Jones and tell him to support Medicare coverage for prescription drugs. It's time to put America's seniors first.

MR. NOBLE: I don't think so.

MR. SIMON: Yeah, I mean if I could jump in to application of their test which is a little different than my test.

MR. NOBLE: Let me just finish. Thinking about it, I don't think that does.

MR. SIMON: Yeah, I--

MR. NOBLE: That's why we were not
58 bothered by that particular one. We do have actually a minor disagreement with Common Cause on this issue, but, no, I think that's the type of ad that is fairly considered a lobbying ad and does

not promote, support, attack or oppose a

candidate. MR. NORTON: I'll tell you

my concern if I

could just jump in before Mr. Simon is I think it's fair to say that some of the ads that we're considering crafting exceptions for don't have as

their primary purpose to promote, support, to attack or oppose. It may be incidental that they have an effect on the election.

But the difficulty that I'm having as we go to craft exceptions that perhaps aren't before

you today is what does that bar mean? What does that limitation mean? And is that, in fact, what it does mean, that we can craft exceptions so long as it only incidentally promotes or supports, or it's not its primary purpose?

MR. NOBLE: No, I don't think incidentally or primary purpose is really part of this. I would say listening to the ad, and that's why I was

59 hesitating, I was

trying to think of everything

that was in that ad, that there is nothing in that ad that promotes, supports, attacks or opposes.

Now, I do want to, by the way, for

everybody to have one disclaimer here. I didn't say you shouldn't use hypotheticals. I just said you shouldn't decide the law based on all the worst case hypotheticals you come up with. Of course you can use hypotheticals. I think slight changes to

that ad would definitely make it promotes, supports, attack or oppose.

Where we drew the line was saying you can mention the candidate, but you cannot talk about the character of the candidate, you cannot talk

about previous positions. So if that ad was changed to say Senator Jones has long opposed Medicaid or prescription drugs.

MR. NORTON: Isn't the statement some politicians have become too cozy with drug

companies an implication that Senator Jones is one of them?

MR. NOBLE: Frankly, I'm not focused on

60 the beginning

part of the ad. Well, that brings it

closer to it. You're going to get into a question about whether or not that's implying that he has. Yeah. I'm sorry. I missed the beginning part of

the ad.

MR. NORTON: I wanted to go back to a question that Commissioner Toner asked earlier of Mr. Simon about direction or control, and which individuals need to be disclosed in connection with

an electioneering communication.

I was thinking there, there are concepts in lots of areas of the law, one in the securities area that's at least 70 years old concerning control person liability. And it would define

those who have essentially day-to-day responsibility for an organization, who can either write checks, hire and fire personnel, bind the organization by contract.

Would a definition along those lines be

what you're talking about in terms of who ought to be disclosed and who need not be disclosed?

MR. SIMON: Yeah, I think that's a good

61 start. I mean

again to me this provision, this part of the statute, really has two purposes. One, to surface for disclosure purposes the sort of control group of the entity that is making the

electioneering communications. And I think the way of getting at that part of it along the lines you suggest sounds right.

But then the second purpose is to ensure that if the entity making the communication is a

front group, that the disclosure gets back to the entity behind it that is in control, that is, in a sense, established, financed, maintained or controlled that front group.

MR. NORTON: Thank you. I see that my

time is up. Thank you.

CHAIRMAN MASON: Mr. Pehrkon.

MR. PEHRKON: Mr. Chairman, Mr. Simon, Mr. Noble and Mr. Stanford, thank you all for appearing here today and thank you for your testimony. My

question is a little bit different than where you've been headed earlier in the day.

It is an implementation question, trying

62 to get a sense of

how big this whole area is, and what I'm looking for is your sense of how many electioneering communications that will be

reportable should be anticipated? Does anybody

have a sense as to how big this might be?

MR. SIMON: Well, you know, there is a lot of activity in the past which falls within the definition of electioneering communication.

I

mean, you know, I think the studies show hundreds

of millions of dollars were spent on these ads. Now,

those should not survive the enactment of the law at least in the form they were made, because what I'm referring to is the spending of corporate and union treasury funds for those ads

which is prohibited by the statute.

You know how much of those same kinds of ads are financed out of corporate or union PACs, I think we just don't know yet, but, you know, some of that is certainly possible, although I would

suspect it's going to be less than the level of this activity we've seen in the past.

MR. PEHRKON: Mr. Noble, Mr. Sanford, do

63 you have--

MR. NOBLE: I agree. I mean this is the \$200 million question that nobody really knows at this point of what's going to happen with a lot of

this money, whether it's going to go in other areas, whether they're going to put into electioneering communication. I think you'll see a lot of activity, probably more than some people are hoping, but we just don't know at this point. It's

something we're going to be tracking.

MR. PEHRKON: Do you sense it will rival the amount of financial disclosure of hard money? Bigger or less or do we have a sense of that?

MR. NOBLE: Well, since soft money now rivals hard money or exceeds hard money, it's possible. But I just really don't know. I mean again this is something that we're going to be watching over the next two years to see what happens to a lot of this money.

MR. PEHRKON: Thank you.

CHAIRMAN MASON: Commissioner Toner.

COMMISSIONER TONER: Thank you, Mr.

64 Chairman. I

think the General Counsel's

hypothetical is very instructive, and I just want to get this straight. Mr. Noble, do you think this promotes, supports, attacks or opposes a candidate

for office?

MR. NOBLE: I'm glad you raised that, because I have to admit I am so attuned to the tag lines in ads that what I was focusing on and waiting for was the tag line, and I had missed the

opening statement.

I think that--yeah, I think with the opening statement that--

COMMISSIONER TONER: I'll repeat it. Maybe I'll do it one more time, because I think it

is very helpful. It says:

Some politicians have become too cozy with big drug companies, and as costs of drug care skyrocket, seniors are suffering. Call Senator Jones and tell him to support Medicare coverage for

prescription drugs. It's time to put America's seniors first.

MR. NOBLE: Yes, given that opening

65 statement, yes.

COMMISSIONER TONER: Mr. Simon, do you concur?

MR. SIMON: Yeah, that's obviously a hard case. You know I think with the implication at the beginning of the ad, it could be read that way.

COMMISSIONER TONER: So that on balance, after this extended discussion, you would conclude that this does promote, support, attack, oppose?

MR. NOBLE: I think that's a fair conclusion of it. Again, it's not one that is without debate, as a lot of these, but I think that's a fair conclusion of it.

MR. SIMON: But let me say, Commissioner

Toner, I think that this discussion illustrates why the commission should not promulgate as an exemption one of the proposed alternatives which has that term, promote/support term directly in the rule itself, because I think that does undermine

the sort of bright line nature that should be part of any exemption promulgated by the commission.

COMMISSIONER TONER: And I wanted to

66 follow up on

that, because I think it's a very

important point. Is it your view then that the phrase "promote, support, attack, oppose" is not sufficiently clear to provide guidance to the

regulated community?

MR. SIMON: Well, that's a good question. Here's my view. My view is that that phrase is a clear test by a sort of analogy to a reasonable person's standard, but I think the Supreme Court,

as there was discussion yesterday, the Supreme Court has distinguished in the level of precision of a test that can be applicable to actors within the political community, like candidates and the political committees, on the one hand, and a higher

level of precision that's needed for a test applicable to non-entities, outside entities, like corporations, individuals, unions, and so forth.

And, you know, that is what the discussion in Buckley was about. That is what the discussion

in MCFL was about. And although I would say that on a kind of reasonable person analysis, the promote/support test is clear and for that reason

67 certainly can be

applied as it is in Title I to

political party spending. I think Congress aware of the distinction drawn by the court decided that a brighter line test was needed in Title II for

direct application to non-political actors.

COMMISSIONER TONER: Let me see if I understand your testimony. The promote, support, attack, oppose rule in your view can definitely be constitutionally applied to candidates and to

political parties, but in terms of other types of actors, that's where you have question?

MR. SIMON: Right. Right. I think that's the line Congress followed in the way it drafted the statute, because it did apply that term directly to political party committees in Title I, and in Title II did not.

COMMISSIONER TONER: My concern is the electioneering communication rule, as we know, applied to a large extent primarily to

organizations other than candidates.

MR. SIMON: That's right.

COMMISSIONER TONER: And this is the area

68 where you think

the promotes, support, attack, oppose framework may be problematic to apply to them?

MR. SIMON: That's right. That's right.

And again, as I said in my opening comments, the approach for this very reason that Congress took in Title II was to draw a, you know, what's considered to be a very bright line, very objective test that defines the basic coverage of what's subject to the

Title II rules.

And it's important in any exemption that the commission writes to try to approach the draft of an exemption that meets equally clear objective standards.

COMMISSIONER TONER: In light of our discussion today, and the hypothetical that the General Counsel promulgated, which I think was very helpful, Mr. Simon, you indicate in your comments that you think that Title II could be applied

constitutionally without any exceptions.

Do you think on balance that's what we

should do? No exceptions whatsoever. You mention

69 a bright line

standard that everybody would

understand, that basically if you identify a clearly identified federal candidate within the time frames, within the targeting, that would be

that. It's an electioneering communication.

No exceptions?

MR. SIMON: Well, you know, I do think the statute is constitutional as it stands.

COMMISSIONER TONER: Do you think we should do that in light of these concerns?

MR. SIMON: Well, you know, there has been a great hue and cry about the need for an exemption that would allow legitimate lobbying communications. We support a narrowly drawn

exemption for that purpose, and we suggest specific language. If the commission deems that important, then we would support your promulgating that exemption. But we would not go beyond that at this point.

COMMISSIONER TONER: Would you support if we came out and granted no exemptions, even for lobbying?

70 MR. SIMON: Yeah.

CHAIRMAN MASON: You would support that?

MR. SIMON: Yes.

COMMISSIONER TONER: Mr. Noble, would you also support that? No exemptions whatsoever?

MR. NOBLE: Yes. Again, I agree with Mr.

Simon, that I think the agency should make an attempt to draw narrow exemptions for these issues, but frankly given the choice between the agency drawing broad exemptions that are just going to swallow up the prohibition or not drawing exemptions at all, I would say then don't do the exemptions.

COMMISSIONER TONER: That if we concluded after wrestling with these issues, and I think this discussion has been helpful, that it's problematic to try to do that, that you would be comfortable with no exemptions whatsoever?

MR. NOBLE: Well, I don't like saying problematic to do that. I mean everything you do is problematic. And nobody said that this is not going to be a difficult job. I think the agency

71 has made a good

attempt in a lot of this discussion and the NPRM to try to address these issues.

COMMISSIONER TONER: But you would agree that no exemptions would be a bright line standard?

Everybody would know where they stand?

MR. NOBLE: No exemptions would be a bright line, absolutely.

COMMISSIONER TONER: And you would support that?

MR. NOBLE: It's not my first choice, but, yes, if that's where the agency went, yeah,

I think--if you decided and you made a record
that

you could not figure out any other way to do it, then I
think then you go ahead with no exemptions.

COMMISSIONER TONER: Thank you, Mr. Chairman.

CHAIRMAN MASON: Commissioner McDonald.

COMMISSIONER McDONALD: Mr. Chairman,
thank you. Let me go back to a few things that

have been raised. I will try to be very careful.

I do not intend to ask and badger, because I don't
think it's very constructive.

72 Let me ask you,

there was an example given
of John Kennedy in 1960. And then in 1984, there
was John Glenn. And we might have Senator McCain in
2004 in the example that was given. That's a 24
year period and a 20 year period, but these issues come
up.

Am I misunderstanding here? I mean wouldn't
the first course of action be the goal of the commission
is not to entrap players in the

process. That's simply not our goal. Anyone who infers
it is is simply not stating the facts correctly.
Wouldn't they first avail themselves of the advisory
opinion process? Couldn't you resolve this before our
distinguished commission who seem

to have very fervent views about this? Wouldn't that be
the first thing you would do?

MR. NOBLE: Sure. That is available to
anybody out there. Courts have in the past acknowledged
that the advisory opinion process is

out there. The commission has an excellent record of getting those advisory opinions out and has dealt with some tough issues in advisory opinions

73 and has in some

advisory opinions stretched to let something go on that even though it didn't fit exactly under the statute, it felt that it did not want to stop.

So, yeah, that's one avenue that's out there for people to get an explanation, the advisory opinion process.

COMMISSIONER McDONALD: Well, refresh my memory on the John Glenn matter. I was here, and I

want to be sure I'm stating this correctly. I mean it wasn't actually a very difficult issue. The issue was whether or not some individuals or political parties or someone active in the political process would have been underwriting. I

guess maybe you could send videos to everyone's home, for example.

Somebody could have done that. This was just a commercial venture--straightforward, as I recall.

MR. NOBLE: The Right Stuff is a movie, maybe 20 years old about now. The Right Stuff--

COMMISSIONER McDONALD: '83 I think is

74 when it came out.

MR. NOBLE: The Right Stuff is a movie that was commercially produced based on a book, and there was some talk at the time about whether it

would help his campaign, and the FEC did not seem to launch any investigation or do any major, undertake any major effort to stop it. I think the FEC recognized it as a normal commercial undertaking.

COMMISSIONER McDONALD: Well, it was certainly very helpful to Senator Glenn, as we all recall.

[Laughter.]

COMMISSIONER McDONALD: Let me press on a minute. You know normally around this table, my colleagues, rightfully so, by the way, point out that this law is difficult in some areas, and that's theoretically what we're hired to do. We're not hired to try to figure out how to figure out

how to fool the panel. I made a special point yesterday of not trying to do that with people that I don't agree with, and I won't do that again

75 today.

I just want to be clear. The issue, and it's a good issue, because everybody has addressed it on this broadcasting business, and I thought the chairman made a good point. He lost me on this business about, and we all understand--what did you say--sky--what was that?

CHAIRMAN MASON: Sky waves. Have you ever listened to KMOX at night?

COMMISSIONER McDONALD: I have continually.

CHAIRMAN MASON: You understand sky waves.

COMMISSIONER McDONALD: All right. Thank goodness. When you reduce it to baseball, I've got

it. I wanted to be sure I was following you on that. The chairman is a little more technically oriented than I am. But he raised an interesting point, and it's one that everybody has addressed, and I want to be clear about this.

The question was raised yesterday, and I think rightfully so, because we're always trying to strike a balance, and I don't think my colleagues

76 are unreasonable,

and I hope people don't think I'm unreasonable, the issue was raised about somebody

trying to start something new. Now forget the fact, as was pointed out earlier--I believe, Mr.

Noble, this was your comment--let's keep in mind that this is within a very narrow time frame. I must say that if people that are on, and I'd like to ask any of you your experience about this, but anybody with a CB or anything else, if the American

public is so attuned to these new rules that my friends are on CBs, then we've accomplished a great deal.

We are truly, we have truly done something that I'm unaware of, because normally the concern

is the other way around, is that people don't have

a clue what's going on. Has that been your experience or am I just way off base here?

MR. NOBLE: That's been my experience. I have to say I had a CB license at one time, and my

experience was that the range was, even though they said up to 30 miles, at least in a city, was about three or four blocks even with a roof antenna.

77 I think that's

one of those peripheral issues, the CB issue, and we did not say that it should be included. I understand Mr. Simon's position on it. I really do think that's a peripheral issue. I don't think CBs are going to present a major problem one way or the other for the agency.

COMMISSIONER McDONALD: I'm not saying we shouldn't consider that as an issue, but I just

wanted to be clear, because, again, I do, and one of my colleagues is fond of this technique, and I agree with him, you have had a lot of experience in this area. I think all of you have had a lot of experience in this area, maybe more so than most of

us on this panel, maybe than all of us on this panel.

And it is the kind of thing that when you infer to people who are watching these proceedings that there is some effort to cap people's ability

to get into a new area, this is just simply not true. It is just not a fact. In the 21 years I've been here, that is just not something that I've

78 ever seen anybody

stand up for the principle

whether I agreed with their philosophy or not.

It's just something that has not happened, and I think it's real important in these kind of

proceedings, and unless you can refresh my memory to something that I'm not familiar with, I'll accept your

years of experience at the commission, because I just don't recall that sort of thing and wouldn't be a part of it.

Thank you, Mr. Chairman.

CHAIRMAN MASON: Commissioner Smith.

COMMISSIONER SMITH: Thank you, Mr.

Chairman. Okay. Let me try to pick up here where I left off. Some of where I was going, I think

you've answered some of the questions. But let me, again, unfortunately, I've got to do a little more of a speech here to cover some ground.

But going back to these Brennan Center studies where they had these college students

determine which people's speech is real speech and which people's speech is sham speech, and they note in these studies that about 80 percent of genuine,

79 what they call

genuine issue ads, were run outside of the 60 day brownout period.

Now, the 60-day brownout period is about 16 percent of the year, so basically genuine issue

ads are being run more often close to an election

than they are being away from an election--about 20 percent versus about 16 percent. But they didn't get the 30 day brownout period at all. At least they don't mention that in their report.

So we can probably figure that some of the genuine ads were running during that time. So I think overall we can probably figure that somewhere between a minimum of 30 percent or 25 percent, may be up as high as 35 percent, of genuine issue ads

under the empirical basis on which Congress is acting

are being run within the brownout period.

Now, that's a pretty high percentage it strikes me. You know we talk about how you can't have a perfect demarcation, but a 35 percent error

rate on speech that almost everybody would agree under the precedents cannot be regulated constitutionally is I think a real potential

80 problem. And I

think that suggests that some kind of exemptions are necessary.

Now, as you mentioned, Mr. Simon, you've crafted a very narrow one here, but I note a number of things about it. For example, you would say it has to refer to legislative or executive branch matter, but you've also gone against any popular title exemption like the McCain-Feingold bill or something like that.

According to the Brennan Center study, 42 percent of the ads they coded were genuine issue ads, and yet only one percent mentioned a bill number. So obviously the vast majority of genuine issue ads aren't using bill numbers. And it's been

suggested--Mr. Noble makes this case convincingly--that there is only a very--this McCain-Feingold, for example, that would only be two states, a couple times in six year periods.

Well, but it is pretty broad, because, for example, if you had something that became popularly

known as the Clinton-Feinstein bill, well, in 2006,
that would blackout the congressional districts or

81 brownout the

congressional districts of 82

congressmen in those two states, plus it would brownout
potentially other congressional districts in Connecticut
and New Jersey and so on that rely

on New York media markets.

Or even to take a real world example, McCain-
Feingold would brownout 16 congressional districts just
in their two states, moderately sized states, plus at
least 14 congressional

districts in Chicago, where you couldn't run broadcast
ads because you'd hit 50,000 people in Wisconsin. So
we'd be browning out at least 30 congressional districts
and probably a few more in Illinois and Indiana that
I've counted.

Now, all of this suggests to me, you also
suggested, Mr. Simon, in your thing that the only
reference to a candidate should be your congressman,
your senator, and we know from polling data that even
during the peak of the campaign

season, fewer than half of Americans can identify
either one of their U.S. senators or their
congressmen.

82 So it strikes me

in all of these things,
we need to be fairly conscious of drawing a
somewhat broad type of exemption or something that
covers this.

Now, getting finally to the punch here. What
would be wrong with simply drafting as the exception any
ad that does not promote, support, attack or oppose a
candidate as exempt, and that will cover the public
service announcements, and

the church ads that Representative Shays said were covered, and all of these kinds of things?

It would seem to me that this would meet the language, the plain language of the statute, which allows appropriate exemptions that don't

promote, support, attack or oppose a candidate. It would meet the intent of Congress because it wouldn't allow any sham issue ads to go forward, since by definition, sham issue ads, I think, are trying to promote or support or attack or oppose a

candidate.

It would, it seems to me, meet the constitutional bright line, because you've

83 suggested that we

could have no exemptions, no exemptions--right--which means there would be none

of that speech. Well, now, people would have a bright line, and it's sort of a safe harbor. More

than 60 days out, they can say what they want.

In the last 60 days, they can say more. If it's not a violation of the constitution to limit that speech in the last 60 days, how can it be a violation to let some of it go forward? So

wouldn't this be a nice simple solution that would handle all the problems?

MR. SIMON: No. You put a lot out on the table. I am not going to be able to get to all of it, but let me try to--

COMMISSIONER SMITH: That was my plan.

[Laughter.]

MR. SIMON: Maybe I'll write a follow-up letter. Let me try to cherry-pick a few points. Look, I haven't read, reread the Brennan Center

report in awhile. You did a lot of kind of fancy dancing with the numbers. Part of the analysis of the Brennan Center report that I think shows a very

84 high correlation,

in the upper 90s, between the ads

that would be subject to this bright line test and time frame test, and what their research deemed to be electioneering ads or campaign ads.

So I think there just may be a conflict in the analysis of the data between the conclusions of the report and the--

COMMISSIONER SMITH: The 90 percent ratios come from what they said the sham issue ads would

be cut out, but we're talking about the genuine issue ad percentages. So you'd still have a lot of genuine issue ads.

But the key point I want to get at is why can't we just adopt an exception that takes the

statutory language and as long as it doesn't promote, support, attack or oppose--

MR. SIMON: Well, let me just make one other prefatory point. I mean I thought you mixed apples and oranges when you were talking about the

popular names issue where you referred to a bill by the names of the senators and then applied it to the coverage of house races.

85 If you're trying

to lobby a member of the

House, you're likely to refer to a bill by the

House name of the bill, not by the Senate name of the bill. And if you mentioned Shays-Meehan in an

ad run in Arizona, you would not be excluded during the blackout period.

COMMISSIONER SMITH: I would strongly disagree with you on that. I think most people know that bill, for example, as McCain-Feingold,

and they would say urge your representative to vote.

MR. SIMON: But to your underlying point, you know, basically my response is based on what I said before, that the approach Congress took in

this part of the statute was to impose an objective bright line test. In earlier versions of the statute, two or three years ago, there was a Furgatch-like test about a reasonable person, and it doesn't, you know, it cannot be construed to

promote, support a candidate, an unambiguous reference.

That was dropped and it was dropped for a

86 reason, and the

reason it was dropped is because

Congress ultimately decided that the approach with the highest chance of surviving judicial scrutiny was to adhere to the Supreme Court's admonition

that when you apply this kind of standard to non-

candidate, non-political committee entities, you

need a bright line test, and I think if you draft

an exemption based on a promote/support standard, that undermines our congressional purpose, and you

should not do so.

COMMISSIONER SMITH: Exemptions are one way

ratchet. It only allows more speech while still giving people the same certainty and protection if they want it by not running the ads

outside of 60 days.

I mean you're kind of saying it's okay to tell them they can't run these ads at all within 60 days, but it's not constitutionally okay to tell them, well, you don't have to. If you want to be

safe, don't run them then, but if you want to run them then, you can take your chances. You can ask for an advisory period in advance or something.

87 MR. SIMON: But,

again, you know, I understand your point, but you're demarcating what you consider to be a safe harbor that arguably has very fuzzy waters around it, and I think that's a problem.

COMMISSIONER SMITH: Now, if we have to have a bright line like this, Mr. Noble, then how can the advisory opinion standard serve as a substitute for that?

MR. NOBLE: There are a lot of areas in the law where we have bright lines, and then there are questions that come up. I don't think a bright line means that every possible situation you know the answer. I think that's what the Supreme Court

was referring to in the earlier case I cited.

I think that we've seen this in all the years of the commission. You think you know all the situations that come up, and somebody comes up with a new one, sometimes very innocently comes up

with a new one, and you need an advisory opinion answer.

If you look at what may be some of the

88 brightest lines

the commission has in the reporting requirements, the FEC gets tons of questions in the

advisory opinions, in the 800 lines, about reporting requirements that people have. So I

think that even though it's a bright line test, it doesn't mean that somebody cannot use the advisory opinion process to find out the actual parameters given a specific factual situation.

COMMISSIONER SMITH: Okay. Thank you.

CHAIRMAN MASON: Commissioner Thomas.

COMMISSIONER THOMAS: Thank you, Mr.

Chairman. Let me go first to the hypothetical that our General Counsel posed. I just want to get clarification. If we were to use the standard

that's being proposed by Common Cause for legislative communications or lobbying communications, I gather that communication would not be an electioneering communication under that standard because there is no--

MR. SIMON: That's right.

COMMISSIONER THOMAS: There would have to be no reference to the particular name of the

89 individual

candidate.

MR. SIMON: That's right. To the name. That's right.

COMMISSIONER THOMAS: So there would be a way to basically do that kind of an ad with that very simple adjustment and everybody would have a very

clear understanding of how to do that; is that right?

MR. SIMON: That's right.

COMMISSIONER THOMAS: With regard to the references to McCain-Feingold legislation, again, assuming the hypothetical is that there is some legislation of that name that's pending and yet to be decided, and someone wants to make reference to

that, the questions come up about, well, what about a situation where it's put out where Senator McCain or Senator Feingold is running or where Congressman Shays or Congressman Meehan is running? It seems to me that there are several fairly easy ways to

deal with that.

If you want to put out an ad where you're attacking that legislation and urging people to

90 contact the

respective member to urge them to vote

against it or for it, you could first of all refer to it as, if you like it, campaign finance reform legislation. If you don't like it, I suppose you

can refer to it as so-called campaign finance reform legislation.

If you wanted to run it in a place where Senator McCain or Feingold was up for election, I guess you could call it the Shays-Meehan

legislation. Conversely, if you want to run it where they're not running, you could call it the McCain-Feingold legislation.

MR. SIMON: Absolutely.

COMMISSIONER THOMAS: There are some

fairly easy ways to get around the clear

bright line test that the statute sets up; is
that correct?

MR. SIMON: That's right.

MR. SANFORD: It's all based on
clearly

identified candidates so--

COMMISSIONER THOMAS: Now, I wanted to get
back to the issue of what about an organization

91 that otherwise is

prohibited from making

electioneering communications maybe having an affiliated
organization, if you will, that's unincorporated and
that wants to work with the

rules on paying for electioneering communications. I
gather both of your organizations, Center for Responsive
Politics and Common Cause, are urging that an
incorporated entity not be allowed to work through a non-
federal PAC.

It could, of course, work through a federal
PAC, which is working with hard money as a result. I
just wanted to get some clarification along those lines.
Is there any opportunity for them to set up some sort of
unincorporated entity

that would be taking in only money from individuals and
that would not necessarily be a federal account of a
PAC?

MR. SIMON: For a corporation or union to do
that?

COMMISSIONER THOMAS: Right.

MR. SIMON: I would say no, because the
statute prohibits a corporation or union directly

92 or indirectly

paying for electioneering communications, and I think establishing a non-federal account, even if takes only individual money, is the indirect financing of an electioneering communication. The corporation, as you indicate, can operate through its federal PAC to make electioneering communications.

COMMISSIONER THOMAS: I gather from your

testimony, when it comes to a non-connected PAC,

you don't have the same kind of concerns?

MR. SIMON: That's right. Because if it's a non-connected PAC, it's not tied to corporate financing.

COMMISSIONER THOMAS: You're aware we've

allowed in some instances people associated with an organization to go over and nonetheless set up a non-connected PAC. It doesn't take any subsidization for purposes of the establishment, administration, and solicitation costs from the

corporation or union that is setting it up?

MR. SIMON: Well, again, that line and how far you go down that road is going to be a function

93 of your

interpretation of the term "directly" or "indirectly" in that provision of the statute.

MR. NOBLE: And I agree with that, and that's what I was thinking about when Commissioner

Thomas was raising that issue, is that we have seen situations where the same people set up an organization, and there is absolutely no connection, no financing, no subsidization, and no connection between the two organizations.

And I'm sure the advisory opinion process will be used to address that situation, and you may have one where you say that they are not connected in any way, directed or controlled or indirectly controlled.

COMMISSIONER THOMAS: We had some 501(c)(3) and (c)(4) organizations or their representatives yesterday, and we'll have some more today who are urging, in essence, that there be some opportunity for them to undertake

electioneering communications through some sort of separate adjunct.

MR. NOBLE: The only caution I have there

94 is that to make

sure when you start examining those

that you use a very strict line about what is

considered control or direct or indirect control. This whole thing will fall apart if the commission

starts going down the line that it has, and frankly an affiliation about that you need to have written documents maybe or explicit agreements on such.

I think you have to be very careful about the use of the word "indirect control," and

Congress was very concerned to get at indirect financing, indirect establishment. And I think you have to keep that in mind in addressing all these.

MR. SIMON: Let me just add one point to that which I think is important is that although

there is a kind of understandable sympathy towards the accommodating (c) (3) and (c) (4) entities as nonprofits, I think the statute really doesn't permit you to do that. The statute doesn't treat (c) (3) and (c) (4) corporations differently than

for-profit corporations.

Indeed, there was, for a long period of time, there was an explicit separation of treatment

95 for (c) (4)

corporations, and that was ultimately taken out of the statute by the Wellstone amendment, and so whatever line you draw about indirect corporate financing for purposes of for-profit

corporations, I think has to be applied to nonprofits as well.

MR. NOBLE: And I may just make clear what

I said, the bottom line is you cannot have a profit corporation establishing one of these. The

question was could you have an individual who

happened to work for one of those establish one of these? And that, I think, is the question that the commission will deal with in advisory opinions. In certain factual circumstances, the answer may be

yes. Under no circumstance could you have a corporation establish one of these.

COMMISSIONER THOMAS: Thank you. I just have to close by asking Larry Noble with your CB experience, I got to know, good buddy, what was

your handle?

MR. NOBLE: I prefer not to say.

[Laughter.]

96 MR. NOBLE: It

was a long time ago.

COMMISSIONER McDONALD: What happened to full disclosure?

COMMISSIONER TONER: This sounds highly relevant.

MR. NOBLE: It was Cancer, and I don't remember why.

COMMISSIONER TONER: A highly relevant piece of information.

CHAIRMAN MASON: All right. I hope Mr. Simon doesn't feel like I picked on him. I think Commissioner McDonald may feel like I do, but just as a matter of disclosure, Mr. Alt, my former employer, yesterday, after I questioned him, came

back and said you really went for the jugular, and he was serious.

[Laughter.]

CHAIRMAN MASON: So I sometimes try to ask difficult questions, but I know our witnesses don't

take anything amiss about that. I want to ask about just one thing that is a real problem out there. It's perhaps not a big one, but it's

97 certainly been

brought up and it certainly happens

and that is the church broadcast issue. And this comes into play in what I think is a legitimate and understandable effort to distinguish if we have

some kind of an exemption between the half hour

infomercial and some other kind of programming which may be paid.

And religious broadcast would be really a typical example of that, where a lot of churches do take an hour of time every week, 52 weeks a year, to broadcast their services, and a lot of the larger churches that do that--I grew up in Lynchburg, Virginia.

Jerry Falwell's church, every fall,

political candidates would show up. They may not ever go to church any other time, but you can be sure one of the last weekends in October, they would be there front and center, and of course the funny thing about it is they're there to

electioneer. They don't say anything, but the pastor recognizes their presence, and so on.

And I just want to ask how should we

98 handle that sort

of situation? Should we take the

position that a pastor/preacher in that situation who recognizes the presence of a political candidate in the congregation right before the

election falls under coverage of this or is there some way we could address it otherwise to make it exempt or permissible?

MR. SIMON: I'll start first. That, as you know, Mr. Chairman, is an example that

Congressman Shays specifically referred to in the context of your Clause 4 authority. So I think it's fair to say that at least some sort of exemption along these lines is within the commission's authority.

I was actually surprised that the

commission did not propose specific language in the NPRM. Frankly, at this point, my preference would be for you not to promulgate an exemption as part of this rulemaking, but to kind of step back,

propose language, get comment on a specific proposal, get more information about the nature of the problem, and then in a subsequent round of

99 rulemaking

address this.

I think the touchstone for any such regulation should be along the lines that Congressman Shays talked about, that it is a reference in passing as part of the service, sort of where there's perhaps a routine and incidental mention.

I think those are the kinds of safeguards that need to be built into the rule, but I do think

the commission has some authority in this area, and as with any other exemption, it should be narrowly and carefully crafted.

CHAIRMAN MASON: And we had several people yesterday encourage us to kind of mimic the IRS

rules or to give a pass to (c) (3)s on the presumption that--by the way, I told them I didn't think we could do that--but in this area--and I understand your concern about not doing something on the fly--but with this particular example, might

that be a useful concept to work with?

MR. SIMON: You know I am just not familiar with the--if there are particular IRS

100 rules relating

to churches. If it's the general

language about, you know, intervention in political campaigns, you know, I'm not sure that's enough. I would think that the commission would need to add

additional safeguards to that.

MR. NOBLE: Also I think that the IRS is dealing in a slightly different situation because what they can do in terms of tax exempt status, which is really what they're dealing with, is

different than what the FEC may be able to do.

I would also agree that it's not something that you should just do glibly. And it is an example of an issue, by the way, that did come up, at least in late afternoon discussions, over the

last 25 years, about what you do about churches,

and there are examples of churches move beyond electioneering communications. There are examples of churches where ministers in the pulpit have used express advocacy, and this is an issue that I think

the commission has been concerned about.

I'd be very concerned about any broad exemption without very carefully looking at--I mean

101 certainly we

need broad exemption. I think before

the commission does anything, it needs to carefully look at all the ramifications, carefully look at the definition of a church, and there may very well

be something open for a reference in passing, but you have to be very careful that this doesn't become a half-hour paid commercial for a candidate.

CHAIRMAN MASON: Vice Chairman Sandstrom. VICE
CHAIRMAN SANDSTROM: Thank you. I

thought the use of the John Glenn movie about The Right Stuff was a very good example of the problems the commission faces if we don't come up with any exemptions. The question for the commission in '83-84 was whether the distribution of that movie,

The Right Stuff, was for the purpose of influencing an election. There would have been no doubt that John Glenn was a clearly identified candidate. That's a bright line test.

And that's why this legislation I gather

was passed because the test for the purpose of influencing was too vague, and now we have a bright line test. We do not have an exemption for

102 entertainment

programming. And so if we go

forward, as some suggest would be acceptable, without any exemptions, it would seem to me that the advertising a new movie about John McCain would

be prohibited, because if it occurred during the time that John McCain was a candidate and was close to a primary or a general election.

So I do think that is a very apt analogy, and precisely identifies why there is a problem in

this area. But we can continue that debate later, but what I also found very remarkable in the beginning of the testimony here is that even though Congress chose to make certain spending a felony, prosecutable by a term

up to five years in jail,

people should take solace in that no one has ever been prosecuted before.

Now, prior when these things were misdemeanors, and the Justice Department was looking for aggravating circumstances, I can

understand why the Justice Department didn't pursue misdemeanors, but Congress having made a choice to make these felonies and very serious offenses, I

103 find it quite

surprising that there be a suggestion

that people--that really wasn't what was intended, because we don't have any enforcement history in those situations. Why would anybody expect us to

actually prosecute people and refer things to Justice because we have no history of doing that?

MR. NOBLE: If I may respond to

that? I

said in my opening statement that I think it is fair and necessary to talk about criminal

prosecution because it is potentially out there. What I was responding to is the sense I got yesterday from the questions that everybody was expecting the Department of Justice to swoop down as soon as this law went into effect and start

arresting people and start doing content analysis of all these ads.

And what I was suggesting there is that is not the history. The reason the Department of Justice did not prosecute under FECA before in the

cases you're talking about was because they were misdemeanors, but even going after felonies, they went after reporting type violations. They did not

104 go after content-

based violations.

But again I think it's fair to talk about the criminal prosecutions. I just don't want to leave the public with the impression that what

we're talking about is an area of the law that there has been this intense criminal prosecution or that there will be this intense criminal prosecution, and you can't deny that one of the reasons the Federal Election Commission was set up

in the first place, one of the reasons the law has civil sanctions, which by the way we do believe can be enforced under BCRA, that the law has civil sanctions was to avoid some of these criminal prosecutions. But again it's fair to discuss.

MR. SIMON: If I could just add to that, nothing in BCRA, even the increase in the penalties, nothing changes what has been true for 30 years, which is that the primary enforcement mechanism for this law is civil enforcement. There

are criminal penalties which I think clearly have always been and will remain reserved for the most serious and egregious and willful examples. And it

105 will be for

civil enforcement that the statute will be enforced.

VICE CHAIRMAN SANDSTROM: And so without these exemptions, someone should not feel chilled

that there may be a felony prosecution by now by a

U.S. attorney, political appointees across the country, that they should look at the experience over the past 15 years in this country and take solace that offenses of the campaign laws, for

instance, like the Pendleton Act, would not be pursued?

MR. NOBLE: No. Anytime Congress passes a law with criminal penalties, people are going to be concerned about it, but I think one of the things

they should be aware of is that it only applies, as Mr. Simon said, to egregious violations, knowing

and willful violations. So where somebody inadvertently steps over the line, somebody doesn't understand where the line is--

VICE CHAIRMAN SANDSTROM: The line is quite clear, isn't it, that if you clearly identify a candidate and you spend more than \$10,000, and if

106 you spend more

than \$25,000, it's a felony.

MR. NOBLE: The line is clear in the present law in an awful lot of areas. And there are very few knowing and willful prosecutions, even by this agency, even civil knowing willful prosecutions. The line is very clear about contribution limits. The line is very clear about 441(b) corporate violations. They are very rarely prosecuted as knowing and willful violations.

VICE CHAIRMAN SANDSTROM: If I were a member of the public, I guess I wouldn't take as much comfort

from that state of affairs. Thank you.

CHAIRMAN MASON: Mr. Norton.

MR. NORTON: Thank you, Mr. Chairman. I notice we're running a little bit behind so I will make my question brief. I think in both comments from Center for Responsive Politics and from Common Cause, you've opposed an exception for public

service announcements. And frankly I don't know and haven't yet checked whether the FCC defines public service announcements, which may help us

107 here.

MR. SIMON: No.

MR. NORTON: They don't?

MR. SIMON: They do not.

MR. NORTON: Okay. My question really picks up on some of the testimony yesterday, and that is if we were to make a distinction between paid and unpaid advertisements, is that an exception that would satisfy you? In other words,

if a so-called public service announcement, if there was no payment made for the airing of that communication, would that be an acceptable exception?

MR. SIMON: No, not only does that not

solve the problem, it exacerbates the problem. I mean I view public service announcements as a sort of subset of a general category, broader category of unpaid advertising. But I think it would be a great mistake to make an exemption for public

service announcements for several reasons.

One, because there is no clear definition of what constitutes a PSA, and you're really

108 leaving it to

the discretion of the local

broadcaster to decide what he wants to run as a

PSA. And in a sense, it gives, I think, too much authority and too much discretion to that

broadcaster and is subject to abuse.

Secondly, I think there already is a track record of PSAs being used for electorally related purposes where by the nature of a PSA, you're putting a candidate in the position of speaking on

a popular issue in a way that will be favorable to the candidate, and if you run those ads close to an election, I think it's just at the very heart of what the statute is trying to get to.

MR. NORTON: One of the issues that we

have to consider is the certification process for qualified nonprofit corporations or MCFL corporations, and one of the questions that we put out for comment is whether the certification ought to be based on the regulation, the commission's

regulation, or whether the certification could be based on prevailing case law?

And I wonder, I think, Mr. Noble, you

109 addressed this

in your comments, if you could address your view on this?

MR. NOBLE: We believe that the certification should be made based on commission

regulations, that it will be uniform, apply across the board. Obviously, those regulations will have to take into account court cases in this area, though the area is somewhat still in

my view unsettled about certification and what type of

corporations should we certified as qualified nonprofit corporations.

I think you run into a lot of problems with just having people doing it based on case law, because you'll get a lot of different factual

situations. Organizations may start treating themselves differently from other organizations, and I think there is just a lot more vagueness in the whole situation if you allow that to happen.

So I would urge the commission to come up with a specific certification process.

MR. NORTON: Thank you. That's all I had. Thank you, Mr. Chairman.

110 CHAIRMAN MASON:

Mr. Pehrkon.

MR. PEHRKON: Mr. Chairman, I have no further questions.

CHAIRMAN MASON: For the convenience of the chairman, at least, we're going to need to take a brief recess. If we could keep it to five minutes, that will help us stay close to on schedule. We'll be in recess for five minutes.

[Recess.]

CHAIRMAN MASON: The Special Session of the Federal Election Commission for August 29, 2002 will come to order. This is our public hearing on

electioneering communications, and we are down to our last panel, which consists of Kay Guinane of

OMB Watch and Kristina Wilfore from the Ballot Initiative Strategy Center.

I think you saw the previous panel, but I'll briefly explain that we do have this light system which is off now again--there we go--which

will give you that green light for four minutes, and a yellow light for one minute. We'll give each of you five minutes to make an opening statement

111 and then go to a

round of questions from commissioners and the General Counsel.

Ms. Guinane has indicated that she's not listening to NPR but has a hearing problem which is

assisted by a microphone which is here on the table. And so, Ms. Guinane, if you'd like to begin.

MS. GUINANE: Thank you. And during that question and answer session, if I misunderstand one

of your questions, please feel free to interrupt, or I may have to ask you to rephrase. One of my hearing aids broke two days ago. So I'm on special assistance here.

OMB Watch is about a 20 year old nonprofit

501(c)(3) organization that advocates for greater civic participation in our democratic society and also for greater public

accountability, both for government and for the nonprofit sector. During the presidential election in 2000, we conducted an

on-line survey of nonprofits all around the country to find out what priorities they had for the next president, what things the next administration

112 could do to

strengthen the nonprofit sector.

And we had questions on there relating to the non-itemizer deduction, increasing volunteering, those sorts of infrastructure

questions, and we were surprised to see that when the results came in from a very enthusiastic response, campaign finance reform was far and away the top priority that nonprofits identified as something that would strengthen the sector.

This is obviously to us a statement about how unlevel the playing field in public policy had become. So we have been enthusiastic supporters of campaign finance reform and trying to represent the views of the small state and local-based nonprofits

that we have tried to encourage to be more involved in public policy debates.

But the flip side of decreasing the influence of money and politics is increasing the influence of the citizen voice, and citizens act

primarily through nonprofit organizations, and strengthening the ability of nonprofits to participate, I think is a key element in campaign

113 finance report,

which is why we are so concerned about the potential impact of the issue advocacy restrictions.

And in looking at the Brennan Center

study, noted that a full 42 percent of the ads that were identified by that study, they called genuine issue advocacy ads, and any rule or law that would criminalize 42 percent of ads by nonprofits during a campaign season I think would be outrageous and

clearly go against the goals that campaign finance reform sets to achieve.

I think more study is needed to identify what distinguishes the genuine issue ads and the genuine nonprofits from the front groups and the

sham ads, but for now, there are some things that we do know. I think if a study went back and looked at the sponsors of genuine ads, you would find that a large number of them are 501(c)(3) organizations, and I know that the complexities of

tax law and the restrictions it places on 501(c)(3) public charities are not something that is the commission's job to figure out or that is

114 necessarily

familiar to campaign finance reform

advocates, but it is a huge fact in the daily life of nonprofits that are involved in public advocacy, especially charities.

And we did a study to try to determine what factors motivate nonprofits to be more involved and what barriers they find in the Strengthening Nonprofit Advocacy Project referred to in our testimony. And we found that the

complexity of the tax rules is a major barrier to participation, that groups just say it's too much to try

and figure all this out. We're safer just not to do anything.

But at the same time we found in a study

that the vast majority of public charities understand that they can't support or oppose directly or even indirectly candidates for office, whether it's federal, state or local, but they also understand that they have the right to speak out on

public issues, and we tell them constantly you are never ever required to be silent on an issue.

Silence on the qualifications of

115 candidates, yes,

but silence on their stands on

issues or on what you think is right or wrong about an issue, no. And we think that whatever exemptions the commission comes up with should

reflect that difference.

There are a couple of overlooked issues, I think, in the proposed exemptions that I'd like to highlight and ask you to consider carefully. One is challenges. Some of the proposed exemptions

just would allow reference to a member of Congress or the president, but in federal elections you have mayors, community leaders, state legislators, governors, a lot of different people are federal candidates who aren't in any position to vote on

federal legislation.

So the rule needs to take that into account and make sure it's possible that a group working on a state or local issue doesn't inadvertently find themselves in violation of

federal campaign finance law because they ask the

mayor to do something in a broadcast.

The other is non-legislative advocacy.

116 The SNAP

research results showed us that generally

charities use the colloquial definition of lobbying when they say that they're involved in public policy. Over 80 percent say that they're involved

in some kind of lobbying and nearly 78 percent with

reaching out to the public with grassroots lobbying.

But this didn't just concern legislation. This concerned regulatory actions, public

education, things the school board may be doing, or the state public service commission or a federal agency. One example, Save Our Cumberland Mountains in Tennessee had a campaign to save some falls in a national forest from strip mining. And this was

asking the Office of Surface Mining not to issue a

permit for mining in a certain area.

Legislation is already passed. Regulations have already passed, but it was a federal agency action, and they were running this

campaign asking people to call Al Gore and ask him

to urge that this land be protected.

So there you had a federal candidate and

117 an issue that

involved no legislation. I think

going with an exemption for unpaid broadcast would be one way to have a very clear bright line that would be easily understood. The vast majority of

public charities can't afford paid advertising anyway.

And that would create a bright line and focus the attention of the law on the problem the law was meant to solve which is the sham

advertising.

In terms of advisory opinions, most nonprofits do not have the resources to come to the commission and ask for advisory opinions. They barely have the resources to get incorporated.

They need to find volunteer lawyers to do their taxes and status applications. It's just not something that they have the resources to do, so that's for the vast majority not a viable option.

In conclusion, I'd just like to ask that

you try to picture the small state and local groups outside the Beltway. I spent yesterday in Kentucky with 25 groups going over the SNAP research

118 results, which

in some ways I missed the testimony,

but is probably the best preparation I could have had for this hearing, because when I asked do any of you do paid advertising? No.

These are human service and environmental, small groups, but they do do a lot of public advocacy. They do do public service announcements and take advantage of free cable broadcast time in their public education efforts.

These are things that are important to strengthen our democracy and that we hope that you will devise exemptions that will allow them to continue. Thank you.

CHAIRMAN MASON: Thank you. Ms. Wilfore.

MS. WILFORE: Good morning. My name

is Kristina Wilfore. I'm the Executive Director
of

the Ballot Initiative Strategy Center, otherwise known
as BISC. BISC is a (c)(4) organization, a nonprofit
advocacy group. We educate the public

about ballot initiatives. We promote the use of
the ballot initiative process. We train
individuals and organizations to sponsor

119 initiatives and

campaign on them, and we monitor
the use and success of the various ballot
initiatives in the states.

And I'm here to testify in support
of a

very narrow issue as it relates to the
exemption, communication that clearly refers
to identified candidates that promote ballot
initiatives or referendums. We strongly
support the inclusion of such an exemption in
the regulations and believe

that an exemption should be expanded to
include communications that oppose as well as
those that promote ballot initiatives.

And there's four points I want to
make around this issue. One is that
communication on

ballot initiatives as state legislation is
protected speech and should remain that way.
As the Supreme Court has recognized,
disbursements made for the purpose of
promoting or opposing the ballot initiative or
referendum represent, quote,

"the type of speech indispensable to decision-making in

democracy and therefore entitled to the
highest degree of First Amendment protection."

120 Therefore, any

limitation placed on the
content of communication by a ballot initiative
committee should be defined as narrowly as possible.
Without this exemption, we believe that

there is a limitation of free speech as it relates to
broadcasting around initiatives.

The second point is that voters have a right
to hear from elected leaders or potential elected
leaders as it relates to their stand on

ballot initiatives. Federal office holders are the very
people who have the prominence and credibility and can
use their clout to advocate for or against a policy
change.

Debates over ballot initiatives currently
do not occur nor should they in a vacuum. Some of the
most important and controversial public policies of our
day have been established through ballot initiatives,
such as allowing physician
assisted suicide, medicinal marijuana, ban on so-called

partial birth abortion, public financing of
elections at the state level, issues that many
would argue would not have become law if it were

121 not for the

initiative process and tend to get
little play in state legislatures or in Congress. Ballot
initiatives by their nature often

spur contentious debate, which is a very healthy

aspect in our opinion of this form of direct democracy. Given the significance of some of the policy changes proposed through initiatives, voters often need cues, often from public leaders, to help determine their position.

A federal office holder who is a candidate in some cases for reelection may be a significant sponsor and a significant figure in sponsoring a ballot initiative or referendum, and may be closely linked in the mind of the electorate.

Just to give some specific examples.

We've talked about John McCain a lot, so I'll throw in this example. The Arizona clean elections law that was established through the ballot initiative has been under attack this year. A ballot

initiative to overturn this law was expected.

Senator John McCain had agreed to cut ads opposing the initiative and supporting the clean elections

122 law.

This would clearly have been a very important campaign strategy given McCain's national prominence on the issue. However, if he were

running for reelection in this case, he would not be allowed to do this when it has really nothing to do with McCain as a candidate, but it has to do with his prominence and leadership on this particular issue.

Other examples. Congresswoman Maxine Waters did radio ads for the Simple Majority Campaign in 2000 when she was up for election in California. Speaker Tom Foley was featured in ads against term limits in Washington state in 1991,

and here's an issue that directly affected his job

specifically, and under this law, if he were a

candidate, he wouldn't have been able to speak on this.

Olympia Snow was featured in TV ads in

1995 for the Maine Won't Discriminate Campaign, and her comments were critical to winning the issue.

Congressman Ted Strickland and Senator John Glenn

123 were also

featured in ads against Measure 2 in Ohio

which would have cut workers compensation.

And Congressman J.C. Watts also did ads

last year in support of Oklahoma's initiative to

establish right to work. Clearly, there's evidence

here that elected leaders play a significant role in

communicating their support or opposition to important

legislative matters in the states.

The third point is that ballot initiative

ads don't currently nor can they in the future promote, support, attack or oppose candidates. Any reference to federal candidates in a broadcast communication is incidental to the promotion of or opposition to the ballot measure.

Thus, an organization supporting or opposing the ballot measure should be able to run a broadcast communication referring to a federal candidate as long as the communication does not support or oppose that candidate.

There has been no history of abuses in

this area as it relates to ballot initiative

committee activity, and there is no indication that

124 it would be a

problem in the future.

The last point is that we think there is an issue of federalism potentially here. Ballot initiative committees are already subject to the full extent of state campaign disclosure. Any attempt to limit communication does create concern in our minds over issues of federalism.

Initiative campaigns are subjected to very burdensome laws that regulate their filing requirements, the time frame in which they need to report donors, voter access to donor information, even a format of the reporting.

So we already believe that there is regulation appropriate to committee activities.

So, again, I support you. I encourage you to support this exemption so that we can allow and encourage more debate on ballot initiatives, not less. Thank you.

CHAIRMAN MASON: Thank you. Commissioner

McDonald is first in the questioning order of this panel.

COMMISSIONER McDONALD: Mr. Chairman,

125 thank you and

thank you all for coming this

morning. Could I go back to the groups that you were with yesterday and just ask you, you had indicated that in numerous cases these groups

really wouldn't have much money to spend at all. Can you give us some assessment of whether you think they meet the threshold of the groups that you met with yesterday?

MS. GUINANE: I'm not familiar with the

groups that were discussed yesterday, because I didn't hear them.

COMMISSIONER McDONALD: That you were talking to. I'm sorry. That you were with yesterday. You said that they gave you good

preparation for today. Maybe I misunderstood.

MS. GUINANE: What I meant was in seeing clear examples of how nonpartisan issue advocacy can involve broadcasts, either paid or unpaid, that involve federal candidates where the groups have no

intention of intervening in an election or influencing the election in any way.

These organizations are all 501(c)(3)

126 groups that

understand they can't support or oppose candidates for office, but they're very involved in

public issues. Most of them provided some kind of social service. A few of them were environmental

groups seeking greater protection in the environment in Kentucky mainly through regulatory action.

But they do a lot of public education that's involved with their fund-raising activities

and also in trying to get support for changes in laws or regulations or in implementation of programs that they think would benefit the people that they serve. And so they're very involved in the public arena even though they're primarily

service organizations.

But they were very clear they understand they can't support or oppose candidates. We even had a discussion on whether or not they think the law should be changed to allow them to do that.

One of the comments that was made, well, then we just have to give money to both sides, and we can't afford that.

127 [Laughter.]

COMMISSIONER McDONALD: That's a phenomenon that is not unheard of actually, as I suspect you're well aware of here in Washington,

D.C.

Just the size of the groups. I mean in terms of the amount of money they raised, do you have a range of that?

MS. GUINANE: The smallest one was a faith-based community organization with a budget of about \$2,500 that works with troubled youth, and they're neighborhood based, and they serve a limited geographic area within the city of Louisville. The largest was county-wide social

service organization that runs a wide array of programs with a budget over a million dollars.

COMMISSIONER McDONALD: Over a million dollars.

MS. GUINANE: But the vast majority of them, I would say, have budgets of \$500,000 or less, and none of them have had any paid advertising.

128 COMMISSIONER

McDONALD: I was trying to very quickly, and I apologize for not being better prepared on this, I was trying to get through your study, very, very quickly. Is it

your sense, at

least in some of the comments that I read here, that most people indicate that they don't think they're lobbyists, but it sounds a great deal like lobbying of the type of activities they do?

MS. GUINANE: In terms of the

Strengthening Nonprofit Advocacy study, yeah, lobbying is a dirty word in some sense. It carries a connotation of undue influence, and they see themselves as educating lawmakers and promoting their issues, and whether it be for legislative or

regulatory or other kinds of changes. Often charities tend to not think of themselves as lobbyists or lobbying because they see the lobbyists as the professionals with the briefcases full of money that go around the Capitol all day

long which is not something that they do.

Most of them don't even have staff that are based in the state capital, and the lobbying

129 that gets done

is either by volunteer board members or by staff as they're able to make time for it.

COMMISSIONER McDONALD: Thank you.

Just

real quickly on the ballot initiative. You

mentioned J.C. Watts which is from my home in Oklahoma. And clearly, this was a state issue. Are there circumstances where you would envision a ballot initiative however that should be encompassed in this sort of activity in terms of

trying to bring it under the rubric of the law?

MS. WILFORE: I'm not sure if I understand

the question.

COMMISSIONER McDONALD: Well, you're seeking exemptions. And my question to you is do

you foresee in relation to a ballot initiative

anywhere in your experience around the country

areas that should be applicable in terms of the law itself or would you just say by the very nature of the ballot initiatives, they really shouldn't be?

MS. WILFORE: Yes.

COMMISSIONER McDONALD: Okay. Across the board?

130 MS. WILFORE:

Yeah, across the board.

COMMISSIONER McDONALD: All right. Fine.

Thank you very much.

CHAIRMAN MASON: I'm second in the

question order and will go ahead. Ms. Wilfore, I'm sort of generally sympathetic to ballot initiatives. But you seem in your own testimony to have sort of drawn out some of the problems that we've got. I'm sure you're familiar with Campaigns

and Elections magazine, and about every year or two we encounter an article by Clint Riley, noted political consultant in California, or someone else about how he has used a ballot initiative to get his candidate elected.

And you mentioned Senator McCain, of course, voted for this rather blanket exemption and Senator Snow as having participated in these, and as sympathetic as I am, I'm having a little bit of a hard time squaring the language of the statute

with your argument for a blanket exemption, because

somebody could well sponsor the apple pie referendum, though the cherry lobby might be upset.

131 But some issue

that they knew would either be very popular in the state or in a somewhat more complicated strategy might produce certain dynamics among the electorate in terms of turnout and cross pressures and so on like that. And I just don't frankly see how we can square that sort of activity and the sort of knowing description of using that to influence elections and say, well, therefore just because it's a ballot initiative, we ought to

let the federal candidate off the hook.

MS. WILFORE: Well, my response would be to that I think it's a fairly subjective analysis that there is a direct correlation between a given candidate and his or her success and the

initiative, and that the articles in coverage in Campaign and Elections on that draw those conclusions in some instances, but to actually prove that I think is questionable.

I mean I think that these are, as I

mentioned before, really important and highly controversial public policy issues, and to say that it's just about that particular candidate's stand

132 on an issue and

that it has little to do with the policy issue at hand or how the state--

CHAIRMAN MASON: Let me clarify. I didn't say either of those things.

MS. WILFORE: Okay. Well, I think that it's still a state legislation. We need more discussion and debate around it. We need the kinds of leaders who are either in office or have a chance to be in office to speak out on these things, and I think that ultimately justifies this exemption and the ability for candidates to continue to speak.

CHAIRMAN MASON: And what would be the problem in that circumstance if the sponsors of the

ballot initiative thought that a federal officeholder was key to their ballot initiative strategy of telling them that they could do this through a federal PAC?

MS. WILFORE: Well, I mean I think that stepping back a little bit, in the ads that have currently been aired, there is no attacking or actually opposing or supporting particular

133 candidates. I

mean that would continue. I mean so

I'm not sure what leads you to believe that it would be continued use in the future that people would use this from purely an electoral standpoint

and not from a policy.

So I mean there are regulations in the ability of the ads that are aired on initiatives and a limitation of the referring to candidates specifically in there, and whether someone should

vote for a particular candidate or vote against them because of that particular position.

So that currently doesn't happen in ads that are aired, and I don't see where PACs would be able to

do that if that's what you're--

CHAIRMAN MASON: No. What I was getting at is that the solution or remedy that sometimes is offered by the supporters of the legislation when people say, well, this is restricting our speech rights, the answer that is sometimes given, well,

you can just form a federal PAC and do it that way.

And I was asking whether that would be a viable alternative for the ballot initiative

134 committees that

you represent if they wanted to run advertisements featuring federal candidates?

MS. WILFORE: I don't know the technicalities of that. I do know that either ballot committees are formed as (c)(4)s or as a political committee, and that there really is no communication around initiatives that is done through a PAC.

MS. GUINANE: I'd like to comment on that question. Based on some of my experience with the (c)(4)s and ballot initiatives, that the people who join these organizations and work on the ballot initiatives unite around the issue and they agree around the issue. They don't necessarily agree

about who should be elected to office, and if they had to create a PAC, not only would there be an additional administrative burden on them in creating a separate organization and all of that, but it would just open up a can of worms that the

organization doesn't need and it's not necessary for them to focus in on their issue.

And this is an example of whether it's a

135 ballot

initiative or a piece of legislation or

something else where a distinction needs to be made between comments on the qualifications or character of a candidate and comments about positions on

issues, because there's a very important distinction.

Free speech rights about public issues, when people assemble together in nonprofit organizations are what needs that high degree of

constitutional protection. That's very different from getting out there and saying I support this ballot initiative or this piece of legislation because I'm a better person or because I'm more qualified. The focus then becomes on the

candidate, whereas in the kinds of ads that you're talking about, the focus is on the issue.

CHAIRMAN MASON: Thank you. Commissioner Thomas.

COMMISSIONER THOMAS: Thanks, Mr.

Chairman. Thank you both for being here. Let me first try to get some better understanding of the suggestion that maybe we could carve an exception

136 for (c) (3)

organizations of some sort, and the

suggestion that there is some Internal Revenue code law that would perhaps adequately cover these kinds of concerns.

We had a witness yesterday who more directly made that suggestion, but I want to borrow on your experience and expertise in this area. Could you give me a little bit of a better understanding as to how our deferring, if you will,

to the IRS and perhaps building in some sort of exception for (c)(3) organizations or maybe even for (c)(4) organizations that undertake lobbying as defined by the IRS regulations, how that might work out?

MS. GUINANE: For 501(c)(3) organizations, public charities, that are recognized by the IRS, the restrictions they operate under in terms of electioneering and supporting or opposing candidates are the exact opposite of express advocacy. They can't do anything that would even indirectly imply support or opposition to a candidate for office.

137 And under the

tax code, this is done through a facts and circumstances test. It's even more vague than the Furgatch rule. There are no specific IRS regulations that define it, but it's

been a fairly workable set of standards that (c)(3)s understand that because it is so, I think, so strict, that there cannot even be indirect implication of support.

So that means that, for example, a (c)(3) that may want to do nonpartisan get out the vote and voter registration activity would not set up a table that would combine voter registration materials with issue advocacy materials when there is a strong difference between the candidates on

that issue and anybody who walked up to the table could then say, well, I imagine that your

organization would support or oppose a certain candidate based on your stand on the issues.

So (c) (3)s don't even mix their issue

advocacy with their voter education, get out the vote activities, because that prohibition is so strict. So by exempting advocacy activities, both

138 legislative and

regulatory and other kinds of

advocacy activities by public charities, the commission would be basically, I think, strengthening the campaign finance law by allowing

this kind of activity to go on, and there would not be electioneering communications with federal candidates.

There would not be the kind of communications that would support or oppose federal

candidates that would result, because they're not happening now.

COMMISSIONER THOMAS: How about in the (c) (4) area though? That's where most of the action has taken place as we understand it.

MS. GUINANE: Right.

COMMISSIONER THOMAS: And there I gather those organizations are permitted to undertake what's called lobbying and grassroots lobbying is included, and the IRS does have some rules that

seem to define lobbying, and what's your sense of what the commission ought to do there in terms of working with IRS rules?

139 MS. GUINANE: In

terms of (c) (4)s, the IRS

rules that define lobbying only strictly apply to

(c) (3)s. (c) (4)s are allowed to do as much

lobbying as they want. (c) (3)s have expenditure

limits under lobbying activities.

(c) (4)s also do not have this absolute prohibition on supporting or opposing candidates for office, so they have more flexibility, but when you have a grassroots lobbying ad that addresses

the issue and addresses the candidate's stand on or the legislator or public official's stand on an issue and asks people to contact them, that's encouraging civic participation, and that's informing the electorate.

If it doesn't comment on their

qualifications for office, then I don't see why there needs to be a distinction between what would be allowable for a (c) (4) or a (c) (3). I think the key distinction there is whether or not there's

comment on their qualifications for office.

COMMISSIONER THOMAS: Well, that's

helpful. Just to finish it up, let's go then with

140 a (c) (4) that

puts out the ad that says Senator

Dinglethorpe has voted to allow strip mining of our beautiful state time and time again. It's time to put a stop to it. Call him and tell him to vote

against Senate bill 35 next month when the issue comes up again.

MS. GUINANE: I think that should be absolutely permissible, and the senator should not be able to hide behind campaign finance laws and

have his position on an issue hidden from the public. The public needs to know those kinds of things to make informed decisions, and if nonprofits are not able to tell the public what public officials have done or what

their positions

have been, then campaign finance law will have basically become a screen for members of Congress to hide behind at election time.

I would imagine that we would see controversial votes being scheduled only within 60

days of election or 30 days of primaries.

COMMISSIONER THOMAS: I gather you appreciate that the folks who press this

141 legislation

forward were fully willing to allow that particular kind of communication to be subject to the new law's restrictions.

MS. GUINANE: I understand that they are,

but I think this is--we have to be careful not to throw out the baby with the bath water kind of situation. There will always be, as Mr. Noble said, we shouldn't make law based on worst case scenarios. And there may always be somebody who

will figure out some loophole somewhere, but we don't deny people constitutional protection because some bad actor may get away with something.

We don't do that in terms of the Miranda rule and the right to be informed of your right to

counsel. So why would we do that with issue advocacy?

COMMISSIONER THOMAS: Thank you. I didn't get

any questions to you, Ms. Wilfore, but I don't know if time will permit later on. Thank you.

CHAIRMAN MASON: Commissioner Smith.

COMMISSIONER SMITH: Thank you. And thank the two of you for coming today. Ms. Guinane,

142 well, let me,

I'll just go ahead, do you think that

the kind of groups that you work with can function under this test and accomplish what you think they need to accomplish through the kind of exemption

that you're seeking here or suggesting we need?

This would allow them to communicate

and

not having it be an electioneering communication if it concerned only a legislative or executive branch matter. It's not clear whether that's limited to

federal legislative and executive branch matters or not. But the communications only reference to a clearly identified candidate is a statement urging the public to contact the candidate and that he take a particular position on the legislative or

executive branch matter.

The communication refers to the candidate only by the use of the term "your congressman," "your senator," "your member of congress," or similar reference, and does not include the name or

likeness of the candidate in any form including as

part of any internet address.

The communication contains no reference to

143 any political

party. The communication does not state the candidate's record or position on any issue. It does not mention the candidate's character, qualifications or fitness for office, and it does not mention the candidate's election or candidacy.

Do you think if we adopted that exemption, that would give the groups you work with sufficient leadway to carry on the kind of public education

that they do?

MS. GUINANE: No. I think the only elements in there that I think would be justifiable from campaign finance standpoint would be a prohibition on mentioning a candidacy, the fact

that a person is running for reelection or a challenger in an election, reference to a political party or their qualifications as candidate.

The rest of those things all relate to substance on the issues, and I don't think that

nonprofits should be restricted from communicating with the public about the substance of issues.

COMMISSIONER SMITH: I think you made two

144 good points here

that I just want to emphasize.

One is that it's not just the actors out there doing activity that will have to change their behavior, but politicians will change their

behavior and move perhaps when certain votes might be scheduled and how they do such things in order to create

the screen and make a higher percentage of ads become problematic.

As I already noted, even according to the

Brennan Center's own material, about 30 percent of genuine issue ads, what they thought were genuine issue ads, would be screened out by the brownout period in the law, but we presume that would probably go higher because politicians would have

an incentive to schedule votes in that time.

Ms. Wilfore, one quick question. Most of the, in ballot initiatives, most of the ads are done in the last 60 days before the election; aren't they?

MS. WILFORE: Yes.

COMMISSIONER SMITH: It seems like a pretty easy one; doesn't it? So not having some

145 kind of

exemption for ballot initiatives would really undercut what folks are trying to do there? MS.

WILFORE: Absolutely.

COMMISSIONER SMITH: Now, do you think that it's open to abuse that some people who want to do it to boost their popularity might do that nonetheless?

MS. WILFORE: I think that there's enough regulation in general of the initiative process and

the role that people who are petitioners or the financial backers of initiatives or federal elected officials or candidates play in communicating about initiatives that we haven't seen any high profile cases where there is abuse currently, and it

really, in essence, comes down to the policy decision at hand and the importance of that public policy rather

than politicians.

COMMISSIONER SMITH: Let me ask you about that policy decision. We've been repeatedly told

that the provision in the act allowing us to promulgate exceptions as are, let's see, necessary to ensure the appropriate implementation of this

146 paragraph,

requires us to not do anything that would have any possibility in the worst case hypothetical for abuse.

Do you agree with that, or do you think

our job rather is to do a balancing between the purposes of the statute and the other purposes for which Congress gave us some authority? I mean why else would they give us authority? Which of those--do you think we have a balancing approach or do we

just have to say if there's any possibility for abuse, no exception?

MS. WILFORE: Well, I think balance is always good, but in this case, what is it that what type of regulation are you talking about that would

allow in certain circumstances federal elected candidates to continue to communicate and in certain circumstances not? I think that the process of making those distinctions is extremely complicated and wouldn't necessarily achieve what

it is I think this legislation is trying to achieve and would limit again the free speech ability to communicate effectively about these policy issues.

147 COMMISSIONER

SMITH: Thank you. Thank
you, Mr. Chairman.

CHAIRMAN MASON: Vice Chairman Sandstrom.

VICE CHAIRMAN SANDSTROM: Thank you. The

questions regarding the ballot initiative are I think
very interesting to me. Aren't many ballot initiatives
either in a reaction to either federal action or
inaction on any issue? Would it be fair to characterize
a lot of ballot initiatives?

MS. WILFORE: Well, yes, I mean certainly from
the public financing of elections and that has been
achieved through the ballot initiative.

VICE CHAIRMAN SANDSTROM: Let me give you a
couple of examples and maybe you can respond. I

understand Nevada has a ballot initiative, and Utah
does, and Florida has a constitutional initiative on
constitutional issues. I've visited in many of my
questions Nevada and about the very controversial
decisions regarding Yucca Mountain.

Wouldn't it be very difficult in Utah to have a
ballot initiative resisting the federal action
without indicating in your ads the president has

148 taken this

action?

MS. WILFORE: For the issue that you're
referring to is that--

VICE CHAIRMAN SANDSTROM: Here we have an
initiative in Nevada that essentially opposing the
use of Nevada as a nuclear waste dump.

MS. WILFORE: Right.

VICE CHAIRMAN SANDSTROM: And you want to convince people that this is a real threat. One of

the ways you probably convince them is the president has proposed and intends to carry out actions to make Nevada the dumping ground.

Wouldn't it be very hard to craft an ad that didn't refer--

MS. WILFORE: Absolutely.

VICE CHAIRMAN SANDSTROM: --to the president's actions?

MS. WILFORE: Yes, it would.

VICE CHAIRMAN SANDSTROM: And if he were

in Utah, and you opposed the creating of the monument, and you wanted to assert the property rights of Utah citizens as you understood them,

149 when Bill

Clinton or Al Gore were candidates,

wouldn't it be difficult to convince people that this was a threat without referring to the actions taken by the president and his administration?

MS. WILFORE: Absolutely.

VICE CHAIRMAN SANDSTROM: And if in Florida, I don't know how I've crafted the constitutional amendment. If I wanted to oppose any actions for drilling off the coast, or be it in

California, and an administration or a senator has proposed that, wouldn't it be difficult to convince people that's a threat unless you identify where the threat was coming from?

MS. WILFORE: Yes.

VICE CHAIRMAN SANDSTROM: Okay. There has been a lot of talk about record of abuse. It didn't seem to me that looking around here that any of us were playing the role of Moses, and then as we're coming down with things etched in stone, that

any rules that we pass, we can change. If there isn't a record of abuse and a record of abuse should develop, this commission is completely able

150 to start a new

rulemaking to address that abuse.

Do you see any limit on our authority to do that?

MS. WILFORE: No.

VICE CHAIRMAN SANDSTROM: So if we don't have demonstrated abuse like in the ballot initiative area, and we all of a sudden see, you know, it being abuse, even though we know federal candidates are limited and they can't raise soft

money for any entity, but somehow some other way it's abuse, and I don't think mere speech is a form of abuse, and the mere fact that people can speak about a candidate is not abuse to me, will it be the corruption that might come from it? But we

don't have any evidence that candidates are using initiative campaigns to promote their own elections.

Then there probably would be no need to regulate, so wouldn't the prudent thing to do is

refrain from capturing those speculative abuses
until they actually occur?

MS. WILFORE: Are you saying then that the

151 exemption

shouldn't go forward because of the--

VICE CHAIRMAN SANDSTROM: Oh, there should
be an exemption because there's no record of abuse.

MS. WILFORE: Right, which is the position
we definitely support.

VICE CHAIRMAN SANDSTROM: Yeah. Rather
than turning it on its head and speculate about
potential abuse that hasn't occurred historically,
according to you, and say but because there's a
potential here, we're going to bar, you know, what
everyone would recognize is important speech in trying
to convince people to take important governmental
actions. And this is direct democracy, the initiative.

I'm from Washington state and I know how much
about the debate over on term limits, and one of the
reasons I'm here is because that debate got overturned.

[Laughter.]

MS. WILFORE: Absolutely. I mean I think
that's exactly what we've been saying. There's not
a record that there is a harm here that justifies

152 making a change,

and we should continue to allow
candidates to speak, as they have, on
initiatives, and readdress it if there comes a
point in which this looks like it's a problem.

VICE CHAIRMAN SANDSTROM: And so would you have any comments on--

MS. GUINANE: I think the same logic can be applied to 501(c)(3) organizations. There's no demonstrated record of abuse by public charities in

terms of electioneering. That's not the group that the campaign finance laws were meant to address, and so I think the same logic can apply.

VICE CHAIRMAN SANDSTROM: So we get church ceremonies out. If we have coverage of the sermon

at Mr. Falwell's institution, until we see that it's being abused, we could essentially let them attend whatever service they would care to even if that was covered on television would be your position? Is that correct?

MS. GUINANE: I'm sorry. I don't think I heard the whole thing.

VICE CHAIRMAN SANDSTROM: I gave a little 153 speech. You don't have to respond to it. Let me turn it into a question at the very end when the conclusion was obvious. So I thank you both very much.

MS. GUINANE: Okay.

CHAIRMAN MASON: Commissioner Toner.

COMMISSIONER TONER: Thank you, Mr. Chairman. I want to thank both of you very much for being here and I'm struck particularly, Ms.

Guinane, with the fact that you work outside the

Beltway, and the groups you mentioned who don't live here don't probably, if they're lucky, follow all the details of this commission. Certainly if they're lucky, they don't have to review hundreds

of pages of regulations.

You indicate they don't have a lot of resources oftentimes. These folks are focusing on their activities. You know you mentioned faith-based community groups, environmental groups,

social service organizations and the budgets that they operate on.

And I was particularly struck by your

154 discussion in

your opening remarks that the

difference between sham issue ads and genuine issue ads. You indicated that at least from your perspective that that's something you have to study

pretty carefully. Is it fair to say that it's your view that that's not an easy distinction sometimes to make?

MS. GUINANE: I don't think it's always an easy distinction to make, but one that has not been

adequately studied. There's been some good beginnings, including the Brennan Center study, but I think much more needs to be done to determine

what really are the factors that distinguish sham issue advocacy from genuine issue advocacy,

especially in terms of the broad array of activities, not just in federal elections, but in communications that are focused on state or local issues where you may

have challengers involved. I think that's one major area that's been left out.

And that's one of the areas where small nonprofit organizations are most likely to run into trouble because it would never occur to them that

155 federal election

laws are anything they would need to worry about.

COMMISSIONER TONER: And that might be a reasonable assumption for them to make when they're

in Nashville, Tennessee or somewhere comfortably outside the Beltway, actually working on state and local issues. Is that fair?

MS. GUINANE: They're pretty shocked to hear that it might be a federal crime to mention

the name of your governor on a public service announcement.

COMMISSIONER TONER: And given the complexity that you mentioned between distinguishing between these different types of

issue ads, are you concerned that if we don't have exemptions for groups such as those that you work with, that some of the communications they've done could be viewed by somebody as a sham issue ad that could be prosecuted? Is that something that

concerns you?

MS. GUINANE: I'm primarily concerned about the chilling effect the level of confusion

156 would be the

result.

COMMISSIONER TONER: Are you afraid they'll pull back?

MS. GUINANE: Yeah, that already the tax rules are complicated enough. If you throw in election law on top of that, there are many groups that will just throw up their hands and say we're not going to get involved, it's just too risky, it's too much to take on, but I then also would be

concerned about retaliatory actions on people on the other side of issues.

We've already seen some evidence of people on different sides of issues reporting the groups that have opposed them on the issues to various

authorities looking for investigation, and even if

a nonprofit had in no way violated campaign finance laws, especially if it were a public charity, just being investigated by the FEC would have a devastating effect on the organization.

COMMISSIONER TONER: And this is where I think your outside the Beltway perspective can be helpful. We hear a lot about that we have this

157 advisory opinion

process, and you know people can

just avail themselves of that and get an opinion from the federal government about whether they can do something.

In your professional judgment, given the organizations you represent in the real world, is that a realistic pathway?

MS. GUINANE: Absolutely not.
COMMISSIONER TONER: Why not?

MS. GUINANE: (A) very few of them are going to know that it's available, and then even if they know it's available, just inquiring to the Federal Election Commission, bringing themselves to your attention is a very frightening thing. You

may not think of yourselves as ogres, but it's something that can be very frightening because their tax-exempt status, especially for public charities, is what keeps them alive. The ability to raise tax-deductible donations and get

foundation grants is what makes it possible for them to operate.

Anything that might hint at electioneering

158 as the IRS sees

it, and bring the IRS down on their heads to threaten the very existence of their organization, and that would be a very frightening and have a very chilling effect.

And the third thing would just be the technical resources in terms of drafting a letter of inquiry for an advisory opinion that would be useful, meaningful, and something that you could respond to.

COMMISSIONER TONER: And Ms. Wilfore, do you share that concern? How likely is it that referenda and initiative groups that you represent would be in a position to go through an advisory opinion process here?

MS. WILFORE: Very unlikely. COMMISSIONER

TONER: Why is that?

MS. WILFORE: Well, I think the types of coalitions that often come together are very grassroots. Our individuals from different

interest areas have sort of enough on their plate
just to get even qualified signatures to get
something on the ballot. And build, you know,

159 raise all the

money and do everything that is
involved in what actually turns out to be fairly
complicated in just how initiative and
referendum campaigns are organized and run.

So I think there would be an issue of
just communicating about this as an option that
would be out there and that there would be the
structure and the organizational entities,
because often it is individuals rather than
organizations who are

pushing initiatives.

COMMISSIONER TONER: And one last
quick question. Is it your view that therefore
if we're going to provide clear standards for
charitable groups, for ballot and initiative
groups, that

we've got to do it now in this rulemaking, and
if
we fail to do that, is it your view that we will not be
giving them the guidance they need?

MS. WILFORE: Yes.

COMMISSIONER TONER: Is that your view

also, Mr. Guinane?

MS. GUINANE: Yes, I agree.

COMMISSIONER TONER: Thank you, Mr.

160 Chairman.

CHAIRMAN MASON: Larry Norton.

MR. NORTON: Thank you very much, Mr.

Chairman, and thank you both for coming. I wanted to start with a couple of questions for you, Ms.

Wilfore. We've had some discussion this morning about the issue of abuse or manipulation of ballot initiatives. There is someone who apparently writes on an annual basis about how ballot

initiatives have been used to manipulate

elections. But I would assume, and

it's been a long

time since I studied political science, that regardless of whether you're intending to manipulate the election or your motive is abuse,

that ballot initiatives do have an impact or can in some instances have an impact on voter turnout and can have a carryover effect on elections concerning candidates. That I assume is consistent with your experience?

MS. WILFORE: Yeah, the research has shown that there is three to eight percent increased voting in initiative states, the 24 traditional

161 initiative

states compared to non-initiative

states. And that there is a direct correlation between an issue being on the ballot and increasing voter participation.

What we don't know, and there really hasn't been research that links it specifically to how, then if people vote for a particular candidates.

MR. NORTON: So the carryover effect is something you're saying there hasn't really been-- MS.

WILFORE: Right.

MR. NORTON: --a study about? You note that in your comments that an organization supporting or opposing a ballot measure should be

able to run a broadcast communication referring to a federal candidate as long as the communication does not promote, support, attack or oppose that candidate or any other federal candidate.

We've had some commenters suggest that

that standard provides sufficient guidance to political parties or those in a candidate setting, but really is inadequate standard to provide

162 guidance to

those who are outside of that setting.

If that were the only exemption that the commission were to promulgate, the only additional exception, would that provide sufficient guidance

to those who operate in your realm, and that is ballot initiatives?

MS. WILFORE: The guidance being the existing standard?

MR. NORTON: That's right.

MS. WILFORE: Yeah. I think that's--I mean what people have been operating with and ballot initiatives have been doing in the status quo seems to be sufficient in terms of regulating the type of communication in ads and the role of federal candidates.

MR. NORTON: What I'm asking really is if the commission were to promulgate a regulation that said that one exception from electioneering communications,

and I think this is consistent with

the statute, is that the communication is appropriate, is not an electioneering communication so long as it does not promote, support, attack or

163 oppose a federal

candidate, my question is would that standard, would that regulation provide sufficient guidance to your constituents?

MS. WILFORE: Yes.

MR. NORTON: It would. Similarly you have supported or maybe proposed an expanded version of one of the proposed exceptions that would permit references to federal candidates that are merely incidental to their candidacy. That standard has

also been criticized by some commenters as providing insufficient guidance. Is that a standard that you regard as workable and clear to your constituent members?

MS. WILFORE: It's clear.

MR. NORTON: Mr. Guinane, I think I just had one question that really covers ground that hasn't been covered with respect to your comments, and that was with respect to the potential exception for communications that refer to the

popular name of the bill.

You propose that the standard, that that exception ought to be limited to the original

164 sponsors of the

bill, and my question for you is

what should the standard be for who is considered

an original sponsor and would a distinction between sponsors and cosponsors be appropriate? How do we

flesh out the line there?

MS. GUINANE: What we had in mind there was the sponsors of the bill when it's originally introduced. And so as time goes on and more and more members of Congress may sign on to a bill,

they would be cosponsors but not original sponsors. So, I guess on the date of filing, the day it goes up on, gets a bill number, and has cosponsors--I'm sorry--has sponsors listed. And Thomas at least makes a distinction between the original sponsors

and cosponsors.

And the intent of that was to avoid a situation where you would have legislation referred to as McCain-Feingold, Morella in Maryland and then referred to as McCain-Feingold-Lewis in Georgia, so

that ads couldn't be tailor made that way.

MR. NORTON: Well, thank you both. That's been very helpful. Thank you, Mr. Chairman.

165 CHAIRMAN MASON:

Jim Pehrkon.

MR. PEHRKON: Ms. Wilfore, Ms. Guinane, thank you for appearing before the commission today, and I've sort of been waiting for this

opportunity for two days now because I am particularly interested in the OMB Watch SNAP report, because it actually gives me some sense of what may be out there.

And when I was looking at that report, if I understood it properly, there are 501(c)(3) organizations was the focus of the study, and there were something like 220,000 of these organizations that were

identified by their IRS 990 files in 1998. Did I get that right? Am I reading that

report correctly?

MS. GUINANE: The total number that filed 990, I don't know that number.

MR. PEHRKON: Well, that's sort of what I saw here. But of that number, I only saw like a

thousand who reported any lobbying expenditures.

Can you explain why only a thousand report lobbying expenditures and 219,000?

166 MS. GUINANE:

The first reason is that much of the advocacy that charities do doesn't address specific legislation, has to do with public education, regulatory change or the way that public

programs are implemented, laws have already been passed, and so none of those things would count as lobbying under the IRS rules.

Another is that a lot of legislative advocacy doesn't meet the definition of lobbying

under IRS rules if it addresses nonpartisan research and analysis or if an organization is responding to a request for technical assistance from a legislative body. So, if you're invited to testify, for example, and give your opinion on a

bill, those expenditures don't count as lobbying, because you're coming at the written request of the body. So that's one reason.

MR. PEHRKON: What I was trying to do, and you can correct me on this, is can I use those

numbers to get an idea of how many 501(c)(3) organizations might be filing electioneering communication reports? Does this give me any sense

167 from the

information that was presented in that report?

MS. GUINANE: Probably not for a couple of reasons. One is that the overall extent of

advocacy is much broader than what the lobbying

expenditures indicates, I think, and the SNAP research bears that out. And the other is that not that many nonprofits can afford issue advertising, so the main areas where public charities would be

impacted I think are--and things that would come below that \$25,000 threshold--either low cost ads or free broadcast time. I think that's all.

MR. PEHRKON: Thank you very much. Ms. Wilfore, one of the things that I'm not sure about

ballot initiative groups is how many are there and how much money do they spend? Do you have a sense that you could let us know on that?

MS. WILFORE: Well, most of the issues on the 2002 ballot, there's about 55 that have

qualified for this year. But at any given point during the year, for example, after the election, let's say we look at this in February, there could

168 be as many as

600 initiatives that are circulating,

so they are somewhere in the process.

They're either filed for certification. They're either collecting signatures. They've either qualified and waiting for the election. So those are the general statistics.

In terms of money spent, I mean the best figures we have are from 1998 showing that there was about in that election 400 million that was spent collectively on the initiatives that were qualified that year, which I believe were around 70 that were on the ballot.

MR. PEHRKON: The other question I had is what is the life expectancy of these ballot

initiative organizations?

MS. WILFORE: Well, there's a whole range of folks who are involved in putting petitions forward. It tends to be coalitions of citizen groups, labor organizations, concerned citizens,

and some nonprofit organizations who do a piece of this type of work, but limited depending on whether they're a (c) (3) or a (c) (4) organization.

169 So their life

span just depends. I mean if it's a coalition that has come together just for a particular petition and an issue, usually after the election they disband in some way. But if they're representing organizations, their organizations, you know, continue to operate in the states in the capacity that they did prior to the petition.

MR. PEHRKON: Okay. Thank you both very much for appearing today.

CHAIRMAN MASON: One request for a second round, two requests, three requests. I hope no one is hungry. Vice Chairman Sandstrom.

VICE CHAIRMAN SANDSTROM: An exemption, if we limit it to qualified ballot initiatives, that means rather than a ballot initiative that hasn't been qualified yet, would that be sufficient to address your concern?

MS. WILFORE: Most of the ads that are run are on qualified measures, but I would not, we would not support necessarily putting a limitation on prequalification initiatives.

170 VICE CHAIRMAN

SANDSTROM: Why?

MS. WILFORE: Well, I think that depending on the issue and depending on the change that's being proposed. I mean there could be instances where early communication about it, just to educate voters, to--

VICE CHAIRMAN SANDSTROM: But it would be outside the windows when--the 30 and 60 days.

MS. WILFORE: Oh, that's correct. Yeah, I mean you're right.

VICE CHAIRMAN SANDSTROM: So it would be very few that would not yet qualify?

MS. WILFORE: That's true.

VICE CHAIRMAN SANDSTROM: As soon as you

qualify, you're exempted. So it's only a very short period of time.

MS. WILFORE: That's true.

VICE CHAIRMAN SANDSTROM: Even where--okay.

MS. WILFORE: That might be reasonable.

CHAIRMAN MASON: Commissioner McDonald.

COMMISSIONER McDONALD: Mr. Chairman,

171 thank you, and I

appreciate you giving us a brief

second round. I had lunch the other day with two of my very best friends in life. One is from Morrison, Oklahoma. The other one is from Pond

Creek, Oklahoma, and I am from Sand Springs, Oklahoma.

So I was interested and fascinated by the question of Commissioner Toner, who is much more adroit at this because he's a lawyer and I am not,

asking these kinds of questions, but I'm fascinated by this business about suddenly the advisory opinion process seems to be somewhat scary.

I was a local election administrator for seven years. First of all, in terms of

initiatives, I can truthfully say that people felt very strongly and they had no problem coming to see me. My problem was trying to keep them out so I could get things on the ballot.

But I do want to ask you about this

because it concerns me a lot. It's kind of
dismissing the process that is set out by law,
suggesting I gather that, well, people really

172 shouldn't avail

themselves of it because it's, you
know, it's too mysterious, it's in Washington
and

so on and so forth. It is a federal law. Both
of you are here today, so I don't, I don't get
the

impression you're very intimidated. I hope
you're not. I don't think you are.

In fact, I think to the contrary. I
think you're quite adequately prepared, maybe
more so

than we are. And I suppose what we could do is

take the position that, well, if anything is
uncomfortable, whether it deals with the IRS, the FEC,
Medicare, Medicaid, then it shouldn't be part and parcel
of the law of the land.

But I'd like to just get a little more

input, and I'd rather not lead you in the answer. I'm
just puzzled by this. The one thing that this agency
routinely, and we've been studied more times than your
studies by Congress, a number of oversight committees,
we get unbelievably high

marks in working with the public.

Now, that's different than the
commissioners. I'm not holding out that the

173 commissioners

get high marks. And I'd start with

myself, so I don't want to be confused. But we have toll free lines. We have advisory opinion processes. We send out bulletins continually and

which people seem to enjoy. You don't seem to be very mystified by the process. I'm assuming that you talk to folks not only about their issues, but about the federal election campaign law. I assume that's why you're here.

Is there other things that we ought to be doing besides just saying, well, gee, it's too tough? Because Congress did pass the law. Are there other things that we could do in conjunction with this, saying, well, gee, you know, we don't

want to put anybody on the spot? Is there other things you could think of that we could be doing to reach out and be more effective with the groups that you're concerned about, because we are too?

No one has a corner on that market on this

panel. All of us are concerned about that. And we've always been concerned. I've been concerned about it for 20 years so I cede that to no one.

174 But what are the

things do you think we could be

doing that would be helpful, because you are out there? As is indicated, you are practitioners. Are there other things that you think of that we

could be doing in this area that would be

helpful?

MS. GUINANE: The kinds of things that we

hear local groups want from us in terms of the materials we produce are clear answers, one page informational sheets that explain how to do things,

procedures that can be done by filling in forms, hopefully on-line, because that makes it much more accessible when you're trying to bridge the gap between national institutions and state and local based institutions and groups.

I think your web site, which already has excellent accessibility to the data and information, to have some clear easy to get to space for groups that generally have not been regulated by the commission before and that don't

engage in partisan activities to find out how could

federal election law apply to me. Written from that perspective, I think would be very, very useful.

175 It's one thing

for an organization like mine and for the Alliance for Justice to go out and do trainings and say this is what the IRS or the FEC rules say, trust me, get out there and

advocate, but it provides groups and their board members a much greater level of comfort to see that same message come clearly from the government agency itself.

Within the last few years, the IRS issued letter, a public letter, just stating and affirming that charities have the right to lobby on legislative matters and explaining how they can use the expenditure test to define the limits that they have on their lobbying, allowable lobbying

resources, and just having that on IRS letterhead was extremely useful in clarifying these rules to the nonprofit community.

I think similar kinds of communications from the commission would be very useful. In

addition, outreach efforts at the state and local level through nonprofit networks meetings of groups like independent sector that have national

176 conferences but

also state-based associations of nonprofits that have state or regional meetings, and often have workshops on legal rules and to send a public education person out into the field to

share information with groups also I think would be very useful for them.

COMMISSIONER McDONALD: Are you intimidated or would you suggest to those that work with you, would you be intimidated to call either

the 800 line or to ask for an advisory opinion?

Did we intimidate you today?

MS. GUINANE: No, I'm not, but I know those that would be, and even--

COMMISSIONER McDONALD: Well, I understand.

MS. GUINANE: --individual staff directors that may not be intimidated may still be highly concerned about public perception of any review of their activities.

COMMISSIONER McDONALD: We all go through that. I understand. Thank you. I appreciate it.

CHAIRMAN MASON: Commissioner Toner.

177 COMMISSIONER

TONER: Thank you, Mr.

Chairman. I think Commissioner McDonald has hit on one of the biggest issues that we've dealt with throughout this rulemaking and also the prior one.

And that is, you know, what obligation we have to issue clear rules now so that people know what their obligations are, or whether there are other processes like the advisory opinion process where we should really sort that out? And, you

know, no one who works on this panel lives in the real world, if you define the real world as being outside of Washington.

I think most people believe that is the real world, and Ms. Guinane, I just want to return

again to your representation, because as I understand it, you represent groups that work out there, environmental groups, nonprofit groups, charitable organizations, and you're going to know more than we're ever going to know about whether

these folks in the real world can come into this agency, after the fact, get advisory opinions, and in your professional judgment how likely is that?

178 MS. GUINANE: I

think it's unlikely. What they're going to want from us when the regulations come out is clear question and answer description and summary of what the regulations are and how

they're impacted so they can go forward with their activities and in planning their advocacy activities.

One of the problems, even if they had the resources to engage in the advisory opinion

process, is it's like common law, you have a situation in California maybe similar to but not exactly the same

as a situation in Massachusetts, and the group in Massachusetts may wonder, well, this may or may not apply to us. And you have to

read four or five advisory opinions to try to piece together what might cover your exact situation.

So having regulations to rely on provides a lot more guidance in going forward and planning and carrying on activities.

COMMISSIONER TONER: In light of the budget reality that you mentioned, how likely is it that you think these organizations will be able to

179 hire Washington

lawyers to go in here and deal with

these nuances? Do you think that's very likely? MS. GUINANE: Very unlikely. COMMISSIONER TONER: Not realistic. In

light of the discussion in an earlier panel about a proposed communication of the General Counsel, his hypothetical, which I thought was very on point, how likely do you think these people would be able to follow that argument and understand or know for

themselves whether or not that proposed communication would be subject to these rules or not? How likely do you think that would be?

MS. GUINANE: I think it's unlikely especially in that it assumes prospective ability

to anticipate when a broadcast might mention a federal candidate, especially if unpaid broadcasts are covered. If you're paying expenditures, it's much easier to anticipate when something like that might occur. If unpaid broadcasts occurred, it

could be inadvertent, it could be a sudden

opportunity where you don't stop to think about it.

So that by its nature, it may be after the fact

180 kind of

situation.

COMMISSIONER TONER: Well, I appreciate very much both of your testimony. I think you've brought a critical real world perspective to these

issues. Thank you, Mr. Chairman.

CHAIRMAN MASON: Commissioner Thomas.

COMMISSIONER THOMAS: Thank you, Mr. Chairman. It's an interesting dialogue. I would just note that one of the proposals for allowing

for lobbying communications fits on about a third of a page, and as I see it, it tells you precisely what you could put in a lobbying communication, and it tells you what you should not put in. So I think the commission could formulate a bright line

test and put it on a third of a piece of paper, and we could maybe be very helpful, as Commissioner McDonald has suggested, in getting that test out in the form of a regulation, and that would alleviate I think the concern that you've expressed about

some folks who might be concerned about seeking an advisory opinion.

With regard to the ballot initiative

181 issue, I just

wanted to inquire. You mentioned the

Oklahoma situation. I'm just curious. This is where Congressman J.C. Watts was in the ad. Can you describe it? Was he sort of front and center

in the spokesman for the cause throughout the course of the ad?

MS. WILFORE: There were two radio ads in

particular there in support of what was the right to work legislation ballot initiative.

COMMISSIONER THOMAS: Do you recall like what was the--

MS. WILFORE: I don't remember the specifics of it, but it was speaking favorably.

COMMISSIONER THOMAS: There he was, his image.

MS. WILFORE: Well, it was a radio.

COMMISSIONER THOMAS: Okay. So there his voice was, and it identified him clearly as Congressman J.C. Watts?

MS. WILFORE: Exactly.

COMMISSIONER THOMAS: I'm just curious. Do you happen to know was he involved in helping to

182 raise any money

for that ballot initiative effort?

MS. WILFORE: I don't know that for sure.

COMMISSIONER THOMAS: Just curious. Do you happen to know did he put out any ads out of his own campaign apparatus where he was using the right to work issue?

MS. WILFORE: I don't know for sure. I would think it would be very unlikely, but it's certainly something that I could find out.

COMMISSIONER THOMAS: Okay. I'm just curious. Those might be kind of relevant considerations because there might be some situations where folks tied to a ballot issue and involved in the ad really are using that issue also

in their campaign, so it would be much to their

advantage to be in an ad like that that deals with the ballot initiative. So that sort of underlies our concern at this point.

All right. Thank you both again very much

for coming, and it was very helpful.

CHAIRMAN MASON: Mr. Norton, Mr. Pehrkon?

That brings us to the conclusion of this panel and

183 the hearing. We

are scheduled for a regular open

session at two o'clock, and we should be able to

make that. So this session is adjourned.

[Whereupon, at 12:45 p.m., the hearing
was

adjourned.]